Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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(5)

No. 89-7024

In The

Supreme Court of the United States

October Term, 1990

WARREN McCLESKEY,

Petitioner,

vs.

WALTER D. ZANT, Superintendent,
Georgia Diagnostic & Classification Center,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MARCH 23, 1990
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RELEVANT DOCKET ENTRIES

U.S. District Court
U.S. District Court for the Northern District of Georgia (Atlanta)

7/7/87	PETITION for writ of habeas corpus with request, to proceed in forma pauperis with ORDER by Judge J. O. Forrester GRANTING request.
7/7/87	MOTION by petitioner Warren McCleskey for discovery with attachments.
7/7/87	MOTION by petitioner Warren McCleskey for stay of execution with attachments.
7/8/87	(yrm)
7/8/87	Response by respondent Ralph M. Kemp to petition for Writ of Habeas corpus with brief in support.
7/8/87	RESPONSE by respondent Ralph M. Kemp motion for discovery by Warren McCleskey.
7/8/87	SUBMITTED to Judge J. O. Forrester on motion for stay of execution by Warren McCleskey, motion for discovery by Warren McCleskey, order, petition for writ of habeas corpus.
7/8/87	Affidavit of John Boger & Robert Stroup filed.
7/8/87	HEARING held on petition for writ of habeas corpus before Judge J. O. Forrester. Affidavits of John C. Boger & Robert H. Stroup filed. Order directing respondent to produce petitioner for hrg. filed (executed by state) * * * R. Stroup, R. Parker, C. Hamilton & W. Harris sworn & testified. Pltf. exhs 3,4,5,6,7,8,9 ADMITTED.
	* * *
7/9/87	HEARING continued on petition for writ of habeas corpus. Pltf's exh 10 ADMITTED.

Court verbally stayed the execution of petitioner set for 7/14/87 pending further evidentiary hrg to be held the first week in August.

7/10/87 ORDER GRANTING motion for stay of execution McCleskey.

* * *

8/5/87 MOTION by petitioner Warren McCleskey to prohibit recall of witnesses with brief in support.

8/10/87 Evidentiary hearing resumed from July 9, 1987.

8/10/87 RESPONSE by respondent Ralph M. Kemp in opposition to motion to prohibit recall of witnesses by Warren McCleskey.

8/17/87 ORDER Federal Public Defender Program, Inc. is appointed to represent plft. (sic) by Judge J. O. Forrester.

* * *

12/23/87 ORDER GRANTING IN PART AND DENYING IN PART petition for writ of habeas corpus (see order) DENYING motion for discovery by Warren McCleskey GRANTING motion to exceed page limit by Warren McCleskey.

12/23/87 JUDGMENT ENTERED for petitioner Warren McCleskey against respondent, Ralph M. Kemp, Warden directing the respondent to retry petitioner within 120 days from receipt of the 12/13/87 nunc pro tunc for 12/23/87.

* * *

1/15/88 NOTICE OF APPEAL from order by respondent Ralph M. Kemp.

1/15/88 MOTION by respondent Ralph M. Kemp for stay of execution with brief in support.

1/21/88 NOTICE OF CROSS-APPEAL by petitioner Warren McCleskey.

1/27/88 Certificate of probable cause requested by petitioner with memo in support and proposed order.

2/3/88 SUBMITTED to Judge J. O. Forrester on probable cause certificate/certification and MOTION for stay of judgment.

3/8/88 ORDER DIRECTING that there exists probable cause to appeal by Judge J. O. Forrester filed.

3/9/88 ORDER GRANTING motion for stay of execution by Ralph M. Kemp staying judgment until the issuance of the mandate of the 11th Circuit Court of Appeals and until that mandate is made the judgment of this court, thereby completing the appellate process by Judge J. O. Forrester.

* * *

5/6/88 MOTION by respondent Ralph M. Kemp for relief from final judgment pursuant to Rule 60(B) with brief in support.

5/13/88 RESPONSE by petitioner Warren McCleskey to motion for relief from final judgment pursuant to Rule 60(B) by Ralph M. Kemp.

5/23/88 SUBMITTED to Judge J. O. Forrester on motion for relief from final judgment pursuant to Rule 60(B) by Ralph M. Kemp.

6/3/88 Application for leave of absence of James M. Nabrit III from 7/7/88 thru 7/28/88.

6/17/88 ORDER ALLOWING extension of discovery until 8/1/88 on the two issues of due diligence and of Officer (sic) Evans' knowledge in reference to the respondent's motion for relief from final judgment pursuant to Rule 60(b);

response time for paper discovery is shortened to 15 days; if a dispute arises during discovery, parties are DIRECTED to seek a conference by Judge J. O. Forrester.

8/2/88 SUPPLEMENTAL BRIEF by respondent Ralph M. Kemp motion for relief from final judgment pursuant to Rule 60(B) by Ralph M. Kemp.

8/11/88 Reply brief in response to respondent's supplement to motion for relief from final judgment uner (sic) Rule 60(b) by petitioner Warren McCleskey.

8/11/88 Amendment (2nd) motion to expand the record by petitioner Warren McCleskey.

8/25/88 SUBMITTED to Judge J. O. Forrester on motion to expand the record by Warren McCleskey.

1/10/89 ORDER GRANTING motion to expand the record by Warren McCleskey and respondent's motion for relief from final judgment is DENIED by Judge J. O. Forrester.

1/30/89 NOTICE OF APPEAL from order by respondent Ralph M. Kemp.

PRETRIAL MOTION –
Superior Court Fulton Co. GA.
(Crim. No. A-40553)

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	)	
	)	INDICTMENT
versus	)	NO. A-40553
WARREN MCCLESKY, et al	)	

MOTION FOR INFORMATION NECESSARY TO RECEIVE A FAIR TRIAL

Now Comes the defendant in the above-stated case, without waiving formal arraignment and moves the Court to require the State through the District Attorney of this Circuit to produce at the trial of the above-styled case, and at any and all non-jury hearings of the above-styled case, the following documents, pictures and articles:

-1-

Copies of all reports and memoranda connected with the said charge against the named defendant.

-2-

All written statements of witnesses in the possession of the prosecutor relating to the charges against the named defendant in the above-styled case, as well as all statements relating to any other defendants in the above-styled case.

* * *

-4-

Statements of all persons including memoranda, summaries recordings of such statements of any person, made to any law enforcement officer or the investigative staff of any prosecute (sic) in any way connected with the above-styled case.

* * *

-8-

All written or recorded statements and all summaries or memoranda of any oral or written statements made by the named defendant and all other defendants named in the above-styled case.

* * *

In support of his motion, defendant states:

The aforesaid documents are in the possession of the State are available to the District Attorney.

All of said documents, pictures and articles are relevant, significant and constitute substantial material evidence and will be useful to and favorable to the named defendant as evidence upon his trial.

The named defendant cannot safely go to trial in this case without the production of said document and in their absence will be denied due process of law as guaranteed by Article I, Section Paragraph III, of the Constitution of the State of Georgia (Ga. Code §2-103) and the Fourteenth Amendment to the Constitution of the United States.

Without the production of the documents referred above, the defendant's counsel will not be able to effectively represent him in the above-styled case; and thus the defendant will be denied the right of counsel which is guaranteed to him under the provisi (sic) of Article I, Section I, Paragraph V of the Georgia Constitution (Ga. Code §2-105) and the Sixth and Fourteenth Amendment to the United States Constitution.

WHEREFORE, the defendant prays:

(a) That the State be required to produce all documents and other evidence referred to above.

(b) Without waiving his right to have his counsel examine siad (sic) documents, pictures and articles, if the Court does not perr (sic) this to be done, that the Court conduct an *in camera* examination of said documents, pictures and articles and his counsel be permitted to see and copy of (sic) reproduce any of said documents, pictures and articles favorable to the named defendant as to the question of guilt or punishment or for the purpose of impeaching any of the witnesses to be called by the State in the trial of the named defendant.

(c) That if any part of said documentary evidence isn't made available to the named defendant prior to the commencement of his trial, then without waiving his right to the production of said evidence prior to his trial, he respectfully moves the Court for an order directing the District Attorney to produce all statement and other impeaching evidence of each witness testifying for the State at the conclusion of the direct examination of that particular witness and in sufficient time so that said

material will be available to counsel for defendant to use while cross-examining the particular witness.

(d) Without in any way waiving the right of this defendant to have his counsel examine said documents, pictures, and article prior to trial and to have his counsel examine all of said documents relating to the impeachment of each witness before cross examining that particular witness, this defendant without waiving his right to have said material produced earlier, moves the Court for an order directing the District Attorney to produce all such documents and evidence and to submit the same to his counsel at the close of the State's evidence.

Respectfully submitted,

SILVER, ZEVIN, SEWELL & TURNER

JOHN M. TURNER, II
Attorney for Defendant

ORDER
Superior Court, Fulton Co. GA.
(Crim. No. A-40553)

(Caption Omitted In Printing)

ORDER

The above-captioned matter came before this Court on September 25, 1978.

After conducting an in camera inspection of certain items of evidence in the State's possession, the Court finds that although the documents might become material for rebuttal at trial, they are not now subject to discovery.

It is further ordered that counsel may, at the proper time, ask the Court for a further ruling if the circumstances make it appropriate to do so.

IT IS SO ORDERED.

This 27 day of September, 1978.

/s/ Sam Phillips McKenzie
SAM PHILLIPS McKENZIE
JUDGE, SUPERIOR COURT
ATLANTA JUDICIAL CIRCUIT

TRIAL TRANSCRIPT

Superior Ct., Fulton Co. Ga.
(Crim. No. A-40553)

October 9, 1978

(Caption Omitted In Printing)

* * *

[BY DEFENSE ATTORNEY JOHN TURNER]:

[631] Q You say you have seen Mr. McClesky with a silver pistol before, is that right?

A [BY MARY JENKINS]: Yes.

Q Have you ever seen anybody else with that gun?

A No.

Q Do you recall telling the police that you saw Mr. Wright with that gun?

A Well, I always saw Mr. McClesky with the gun when he was in my house.

Q Okay. Let me give you what is part of your statement and ask you to look at these questions and answers and see if you gave them to the police. Would you do so, please?

A Here you go.

Q Is that your signature at the bottom of that page?

A Yes, it is.

Q Okay. What day did you give this statement to the police?

A The 5th and the 30th.

Q Okay. So you give it on May 30th, is that right?

A Yes.

Q Okay. Having read this, does that refesh your recollection now?

A I don't remember.

* * *

[632] Q Okay. The next question is, "Mrs. Jenkins, have you seen Ben Wright with any other guns? Answer. He took my gun, which is a .32 caliber blue steel revolver, and I also seen him with a .38 caliber silver in color with long barrel." Do you recall that question and answer?

A Yes.

Q Tell us about that. What circumstances and when did you see Mr. Wright with that silver colored gun?

A I saw it in my house and he had it in his pocket.

Q Who had it?

A Ben.

Q When did you see this?

A It was before May the 13th.

Q How much before May the 13th?

A About a week.

[633] Q Okay. When was the last time you saw the gun at your house?

A The last time I saw the gun at my house was before May the 13th.

Q Well, that is what I am saying. How much before May the 13th if you can pinpoint it, a day or a –

A About a week.

Q Okay. Now, the next question, "Have you ever seen Warren McClesky with a gun other than the shotgun he removed from your house on May the 13th, 1978? Answer: He totes a .45." Do you recall that?

A A .38. It looked like a .45 but it was a .38.

Q .38 what?

A Silver pistol.

Q Okay. I though you said you knew guns.

A That short, fat gun, it looked like a .45.

Q Well, what I am saying is – are you saying your answer here is incomplete then?

A Yes.

Q Okay. So you are saying there should have been more onto this than what you said?

A No.

Q Well, why didn't you tell the police that you had seen him with that silver gun before?

A Tell the police I seen –

[634] Q Mr. McClesky – why didn't you tell the police in the statement that you were giving them that you had seen Mr. McClesky with the silver gun?

A I did see Mr. McClesky with the silver gun.

Q They asked you that question?

A Yes.

Q And you said the only thing you had ever seen him with was a .45, didn't you?

A It was a .38. Another one was a .45 and a shotgun and a .22 caliber pistol, long-range.

Q Okay. Why didn't you tell them all that when they asked?

A I said I lied.

Q Oh, you were lying when you said Mr. McClesky only carried a .45?

A I said I lied to them at first. I saw McClesky with a long .38, plus I saw that big gun that looked like a .45.

Q Okay. Well, are you saying that you were lying when you told the police that the only thing he toted was a .45, that is what I am trying to understand?

A I though it was his gun, but it was Burney's gun.

Q How did you find that out?

A Well, between his sisters.

Q Well, at the time you gave the statement you said that this statement was true and correct, didn't you?

[635] A Yes.

Q Did you ever tell the police otherwise?

A No.

Q Before you talked to the prosecutor in this case you had never told the police that you saw Mr. McClesky with a silver gun, had you?

A I told the police I had seen him with one.

Q When?

A Before this had happened. I told him I seen him with it in a brown bag.

Q Okay. Why isn't that in any one of the three or four page statement you gave the police on the 30th?

A I don't know. It's supposed to be in there.

Q You did read the statement before you signed it, didn't you?

A Yes.

Q Okay. Has there been any mention of payment of a reward in this case to you for you testimony?

A Yes.

Q How much?

Q They said there was a thousand dollar reward.

MR. TURNER: No further questions.

* * *

[680] RECROSS-EXAMINATION

BY MR. TURNER:

Q Mr. Wright, how many crimes have you been convicted for all total?

A [BEN WRIGHT] I can't count them.

Q Why not?

A Well, because there's quite a few.

[681] Q So many you can't remember, right?

A Yes, sir.

Q You can't even remember how much time you have served altogether, can you?

A No, sir, I cannot.

Q It's been that much, hasn't it?

A Quite a bit.

Q Do you want to go back to jail now?

A I will have to. I am guilty of this crime, I have to go back to jail.

Q Going back to jail is better than facing the death penalty, isn't it?

A Well, naturally, yes, it is.

Q Now, you used the name James Edward Smith in connection with what?

A In connection with an escape I was on at the chain-gang, it was an alias. If I was apprehended by the law, it was a possibility I could get out before they knew who I was, and Ben Wright would have been a sure giveaway and I changed my name.

Q When you were arrested in Pine Bluff you did not have a silver gun?

A I think I did, a .38 gun.

Q What happened to it?

A I think the authorities now have the gun.

[682] Q Is that the only silver. 38 you have ever had?

A The only one?

Q Yes, sir.

A Yes, sir, that is the only one I ever owned. I have had a .38 silver one in my possession. Matter of fact, I have kept the same gun Warren McClesky killed the officer with. I have kept it for a week or two.

Q When did you give that gun to McClesky then?

A I gave that gun to McClesky on several occasions.

Q Such as?

A Like he have came up and got it a couple of times. He have came and got it on three or four different occasions, you know, and brought it back.

* * *

[830] Q [BY ASSISTANT DISTRICT ATTORNEY RUSSELL PARKER]: Specifically, Mr. McClesky, have you ever had a conversation when you were in that jail cell, one north fifteen, either with Mr. Dupree, who was over above you, or with the man who was in the cell next to you, stating that you shot the police officer?

A [BY WARREN McCLESKEY]: No, sir, I have not.

MR. TURNER [DEFENSE ATTORNEY]: Your Honor, before we go any further, could we approach the Bench for a minute, please?

THE COURT: Yes, sir.

(Whereupon, the following discussion was had between Court and counsel at the Bench, out of the hearing of the jury.)

MR. TURNER: Your Honor, I think that from the direction of things from what Mr. Parker is saying it appears that he must have some other statements from the defendant. I asked for all written and oral statements in my pre-trial motions. If he has something he hasn't furnished me, I would object to getting into it now.

THE COURT: Well, he has a statement that was furnished to the Court but it doesn't help your client.

MR. TURNER: I am not dealing with that part of it. I am saying I asked him –

[831] MR. PARKER: It's not exculpatory.

THE COURT: You are not even entitled to this one.

MR. TURNER: I am entitled to all statements he made. That is what the motion was filed about.

THE COURT: This is not a statement of the defendant.

MR. TURNER: We are not talking about a statement of the defendant.

THE COURT: I don't know that we are talking about any written statement.

MR. TURNER: I am saying I filed for oral and written statements. I asked for all statements of the defendant.

THE COURT: Let the record show I wrote you and made it of record. It is not admissible and what he is doing is in the Court's opinion proper.

MR. PARKER: I would like to place in the record at this time, if Mr. Turner doesn't mind, that I have furnished him complete copies of everything except what we are about to get into, plus some Grand Jury testimony, and he has had use of it during this trial.

MR. TURNER: I don't object or argue about that, I am simply saying –

MR. PARKER: I want the record to reflect that.

MR. TURNER: I am saying he didn't furnish me with everything, and that is one of the requirements of the law in terms of furnishing all statements that a defendant makes.

[832] THE COURT: Well, that will be a defense that you can use in the Appellate Courts if he has violated the law.

MR. TURNER: I would object at this time on that basis.

THE COURT: I will let the record show he has not violated the law, in my opinion.

MR. TURNER: I will let the record show he has furnished me everything, and for the first time here today at trial he may have some oral or written statement from

my client that he has never furnished me. I would object to any introduction or admission of those statements.

THE COURT: I will overrule the objection.

PETITION FOR WRIT OF HABEAS CORPUS
Superior Court, Butts Co. Ga. (H.C. No. 4909)

WARREN MCCLESKEY,
Petitioner,
v.
WALTER ZANT, Warden,
Georgia Diagonistic and
Classification Center,
Respondent.

H.C. No. 4909

I. INTRODUCTION

(1) This is a petition for a writ of habeas corpus to relieve the petitioner of restraint under a conviction and sentence of death imposed upon him by the State of Georgia in violation of his rights under the Constitution of the United States and of the State of Georgia.

* * *

IV. Respects in Which Petitioner's Rights Were Violated

* * *

(20) The State's failure to disclose its arrangement made with a police agent or informer, who testified at trial and who was not prosecuted for an outstanding escape charge because of his cooperation and testimony, violated petitioner's rights guaranteed by the due process clause of the Fourteenth Amendment, and Sections 2-101 of the 1976 Constitution of the State of Georgia.

(21) The deliberate withholding from petitioner of a statement by defendant, allegedly made to a government agent or informer while petitioner was incarcarated and awaiting trial, denied petitioner due process rights guaranteed by the due process clause of the Fourteenth Amendment to the United States Constitution and Section 2-101 of the 1976 Constitution of the State of Georgia.

* * *

Respectfully Submitted,

/s/ Robert H. Stroup

ROBERT H. STROUP
1515 Healey Building
57 Forsyth St. N.W.
Atlanta, Georgia 30303

JACK GREENBERG
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ATTORNEYS FOR THE
PETITIONER

AMENDMENT TO PE ITION FOR WRIT
OF HABEAS CORPUS
Superior Court Of Butts Co. Ga. (H.C. No. 4909)

(Caption Omitted In Printing)

Comes now the petitioner, WARREN McCLESKEY, and files this Amendment to his Petition for Writ of Habeas Corpus. The following additional paragraphs are added to the petitioner's claims:

(35) The introduction into evidence of the petitioner's statements to an informer, elicited in a situation created to induce the petitioner to make incriminating statements without the assistance of counsel, violated the petitioner's right to counsel under the Sixth Amendment to the Constitution of the United States and Section 2-111 of the 1976 Constitution of the State of Georgia.

(36) Petitioner was convicted of the charges of murder and two counts of armed robbery without proof of his guilt beyond a reasonable doubt, in contravention of the due process clause of the Fourteenth Amendment and Section 2-101 of the 1976 Constitution of the State of Georgia.

Respectfully submitted,

/s/ Robert H. Stroup
ROBERT H. STROUP
1515 Healey Building
Atlanta, Georgia 30303
ATTORNEY FOR
PETITIONER

STATE HABEAS CORPUS TRANSCRIPT
WARREN McCLESKEY vs. WALTER ZANT
Superior Ct., Butts Co. Ga. (No. 4909)
January 30, 1981

(Caption Omitted In Printing)

[BY TRIAL DEFENSE ATTORNEY JOHN TURNER]: . . . In addition, I filed a motion asking for all oral and written statements within the possession and control of the Prosecutor. So I did not have any forewarning that Mr. Evans was going to testify to some statement that he allegedly overheard based on those circumstances.

C [BY ROBERT STROUP]: All right. Just so the record is clear, what – briefly what did Mr. Evans testify to at the trial?

THE COURT: Mr. Stroup, the record will indicate what he said. That is far more reliable than what he can remember.

MR. STROUP: All right. Your Honor, I basically was – rather than for the record which is in the record, I will give you a brief introduction about it.

THE COURT: Well, I think that the question should be why did they not give you a copy of the statement he made if you made a motion for it.

THE WITNESS: Well, I can't answer that question even up to this point in time. That was one of the issues that I raised on appeal, the fact that I was never given any indication that such a statement existed.

THE COURT: Do you mean that you talked to the Prosecutor six times and you two never discussed that at all?

THE WITNESS: We went over the motions, all of the motions and the only thing that he said to me about his file was that there were two things that weren't included in the file. One was the Grand Jury testimony of a witness and his logic there was that that was not discoverable. And the other was just a statement he had and that he didn't disclose what it was or who the person was in that context.

They clearly understood and they knew that the motion had been filed. So my thinking on the matter was that I had everything, particularly relating to the statements of the Defendant.

DEPOSITION OF RUSSELL PARKER
Superior Ct., Butts Co. Ga. (No. 4909)
February 16, 1981

(Caption Omitted In Printing)

[8] Q. [BY ROBERT STROUP]: Okay. Now, I want to direct your attention to a statement from Offie Evans that was introduced at Warren McCleskey's trial and ask you a few questions about that statement. How was it that you came to learn that Offie Eavns (sic) might have some testimony that you would want to lose in the Warren McCleskey trial?

A. [BY ASSISTANT DISTRICT ATTORNEY RUSSELL PARKER]: Okay. When you referred to a statement, Offie Evans gave his statement but it was not introduced at the trial. It was part of that matter that was made in camera inspection by the judge prior to trial.

Q. All right. Let me make clear what my question was, then. Offie Evans did in fact give testimony at the trial – let me rephrase it. When did you learn that Offie Evans had testimony that you might want to use at trial?

A. I believe I was first notified by Detective Jowers or Detective Harris, homicide detectives, who apparently had been contacted by a deputy, C. K. Hamilton. I don't recall at this point whether Jowers and Harris went out to the jail to talk to Offie and that involved me or whether they called me [9] over to the Atlanta Police Department and we talked to Evans there. I know I did talk to Evans and I did talk to him at the Atlanta Police Department.

Q. How about Detective Dorsey? Do you recall Detective Dorsey being involved at all?

A. Dorsey was involved in the investigation. At what point, I don't remember.

Q. All right. How about specifically with respect to testimony of Offie Evans? Do you recall Dorsey having any role in developing the testimony of Evans?

A At this point I don't know if Dorsey had any role in it. The only thing I remember really is that Deputy Hamilton, Detective Jowers and Harris.

Q. Did you, yourself, have any prior dealings with Offie Evans prior to his becoming involved in the Frank Schlatt case?

A. No, sir, I didn't know Offie Evans prior to that time.

Q. Okay. Were you aware at the time of the trial of any understandings between Evans and any Atlanta police department detectives regarding favorable recommendation to be made on his federal escape charge if he would cooperate with this matter?

A. No, sir.

Q. Let me ask the question another way to make sure we are clear. Are you today aware of any understanding between [10] any Atlanta police department detectives and Offie Evans?

A. No, sir, I'm not aware of any. I understood that he was not prosecuted for the escape but I understand he was placed back in the federal penitentiary.

Q. Okay. Did you, yourself, after the Warren McCleskey trial, contact any FBI agents to discuss with them the matter of a pending escape charge?

A. I have talked to several FBI agents about the case. Only one time did it involve Offie Evans. And that was after all the trials were completed. And I believe it was in regards to segregating him in some way out at the federal pen for his own protection.

* * *

[14] REDIRECT EXAMINATION

BY MR. DUMICH [Assistant Attorney General]:

Q. I just have a few questions. Mr. Parker, in regards to Offie Evans's testimony at trial, Mr. McCleskey's trial, was there any deal whatsoever made with Mr. Evans in exchange for his testimony at the trial?

A. [BY RUSSELL PARKER]: I'm not aware of any. I don't know of any deal.

Q. What about at the Burney trial? Was there anything, was there any indication given by you to Mr. Evans prior to his testimony in the Burney trial that you would do anything for him or try to do, try to contact people for him to try and see that his escape charge wasn't prosecuted or that he would get a reduction in sentence or anything along those lines?

A. I have never asked anybody to drop a charge. I don't know of Offie ever asking anybody to try and get the charges dropped for him. I am not surprised that they are dropped. Obviously the police officer was killed and the guy testified twice for the state. It doesn't surprise me in the least that the charges have been dropped. But the fact that the charge was dropped doesn't mean that he wasn't punished because he was put back in the federal pen.

Q. Do you have any knowledge that Mr. Evans was working [15] as an informant for the Atlanta Police or any police authorities when he was placed in the Fulton County Jail and when he overheard these coversations (sic) of Mr. McCleskey?

A. I don't know of any instance that Offie Evans had worked for the Atlanta Police Department as an informant prior to his overhearing conversations at the Fulton County Jail.

LETTER, State Habeas Corpus Proceedings
Superior Court, Butts Co. Ga.

THE DEPARTMENT OF LAW
STATE OF GEORGIA
ATLANTA
30334

February 17, 1981

Mr. Foster Corbin
Certified Court Reporter
1293 Peachtree Street, N. E.
Suite 828
Atlanta, Georgia 30309

Re: *Warren McClesky v. Zant*, habeas corpus – deposition of Russell Parker.

Dear Foster:

Enclosed is a complete copy of the prosecutor's file resulting from the criminal prosecution of Warren McClesky in Fulton County. As agreed by counsel for both parties who attended the deposition of Mr. Russell Parker on February 16, 1981, the enclosed file (including cover sheet) is to be attached to Mr. Parker's deposition as Joint Exhibit A and forwarded along with the deposition to the Superior Court of Butts County.

If you have any questions concerning the aforesaid, please contact me at 656-3499.

Sincerely,

/s/ Nicholas G. Dumich
NICHOLAS G. DUMICH
Assistant Attorney General

NGD/cab

cc: Mr. Robert Stroup
Attorney at Law
1515 Healey Building
Atlanta, Georgia 30303

FEDERAL HABEAS CORPUS HEARING
(U.S. District Court, N.D.Ga.) (No. C-87-1517-A)
PETITIONER'S EXHIBIT #2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WARREN McCLESKEY,	:	
Petitioner,	:	CIVIL ACTION
vs.	:	NO. ___
RALPH KEMP,	:	
Respondent.	:	

AFFIDAVIT OF ROBERT H. STROUP

STATE OF GEORGIA)
)
COUNTY OF FULTON)

Personally before the undersigned officer duly authorized by law to administer oaths appeared ROBERT H. STROUP, who, after being duly sworn, deposes and states as follows:

1. My name is ROBERT H. STROUP. I am more than eighteen years of age, and am under no legal disability of any kind. This affidavit is given freely and voluntarily, without coercion of any kind. I understand it will be used in court proceedings on behalf of Warren McCleskey.

2. I was initially retained to represent Warren McCleskey in April, 1980. At that time, a petition for writ of certiorari to the Georgia Supreme Court was due to be filed in the United States Supreme Court within days of

my retention, and my first act was to obtain an extension of time for the filing of that cert petition.

3. I filed a petition for certiorari in the United States Supreme Court in June, 1980. One of the issues I raised on McCleskey's behalf was a Brady claim – that the State had wrongfully withheld McCleskey's oral statement to Evans. In preparation for bringing this claim I reviewed the Georgia Supreme Court decision as well as the trial transcript. I did not understand that there was a written statement from Offie Evans. Like the Georgia Supreme Court, I understood that there was an oral statement, and that it had been introduced in its entirety through Evans's testimony at trial.

4. The next major development related to the case was the denial of cert by the United States Supreme Court in October, 1980, and the setting of a new execution date. On December 19, 1980, McCleskey appeared in Fulton Superior Court and his execution was scheduled for January 8, 1981.

5. In December, 1980 and January, 1981, I did extensive research and investigation relative to the habeas corpus petition that was filed on McCleskey's behalf in Butts Superior Court on January 5, 1981. More than 20 substantive claims were raised in the petition; several of them required investigation outside of the trial transcript. In January, 1981, I interviewed, in person or by phone, more than 30 persons relative to these claims.

Among the facts which I sought to develop were the facts surrounding Evans's involvement as a witness at McCleskey's trial. At no time during the state habeas process did I learn of the existence of a written statement

given by Offie Evans prior to McCleskey's trial. I would surely have requested that information had it come to my attention, given my effort to develop the details of Evans's relationship with County and City personnel.

6. During the course of the federal habeas hearing, I sought further discovery of federal officials regarding the circumstances surrounding Evans's escape from the federal halfway house. Again, at no time did it come to my attention that Evans had given a written statement to Atlanta police and the Fulton County District Attorney's office in August, 1978.

7. After the October, 1986 argument of McCleskey's case in the United States Supreme Court, Jack Boger and I continued to examine possible constitutional claims that might be raised on Mr. McCleskey's behalf. One issue to which our dicussions (sic) returned was the understanding between Offie Gene Evans and Atlanta police detective Sidney Dorsey, under which Evans expected that Dorsey would "speak a word" with federal authorities about his pending federal escape charges in exchange for his testimony against McCleskey. A majority of the Court of Appeals had denied relief on this claim, finding that the understanding between Evans and Dorsey was too "marginal" or insubstantial to have constituted a "promise" under *Giglio v. United States*, and that revelation of the understanding to McCleskey's jury would have been "unlikely [to] . . . have affected the jury's assessment of Evans's credibility."

8. We were both troubled, however, by the factual premises of these legal conclusions and we decided that it could prove useful to speak with Offie Evans to clarify

the understanding he had worked out in 1978 with Detective Dorsey. We also agreed to contact McCleskey's jurors, to determine firsthand whether revelation of Evans's agreement with Dorsey may have made a difference in their verdicts.

9. We began in late March of 1987 what proved to be a long, expensive and fruitless effort to make direct contact with Offie Evans. Working through the Department of Corrections, I determined that Evans was back in the state penal system, serving a sentence in the Ware Correctional Institution in Waycross, Georgia. I spoke with Ware Correctional officials and determined that we could visit Mr. Evans with his agreement. My co-counsel, Jack Boger then wrote to Evans, asking permission to speak with him. When our letter went unanswered, I spoke again with Ware officials and learned that an inmate counsellor was available to convey our request to Evans directly. I spoke with his counsellor, but was again unable to schedule a meeting.

10. We then learned that Evans was scheduled for release and was expected to return to Atlanta on May 10, 1987. I contact (sic) his sister and requested that she let me know when Evans arrived in Atlanta. She agreed to do so. Yet during the week of May 11-15th, I was unable, despite frequent attempts, to make direct contact with Evans. Thinking that perhaps a black, rather than white, attorney might be able to establish some greater amount of trust with Evans and his family, I asked a young black attorney, Bryan Stephenson, to attempt to make contact with Evans. For several weeks Stephenson tried to talk with Evans, making frequent visits to several of Evans's

relatives at different hours of the day and night. His efforts were also unsuccessful.

11. Finally, sensing that time was growing short, Jack Boger and I decided to hire Delaney Bell, a highly-recommended private investigator, to locate Offie Gene Evans. Although Mr. Bell (i) checked probation sources – who informed him that Evans had not shown up for required probation meetings; (ii) talked with numerous family and community sources; (iii) checked Atlanta Police Bureau sources and (iv) "staked out" the locations where Mr. Evans was said to sleep, he was unable to locate Evans.

12. As indicated earlier, our purpose in seeking Offie Gene Evans was to learn more about the understanding he had reached in 1978 with State officials, to strengthen the factual basis for the Giglio claim. During one telephone conversation with Jack Boger in late May, 1987, we explored other possible sources of information. I mentioned to him, in passing, the recent success of a number of Georgia broadcasters in obtaining police investigative files in the Wayne Williams case.

13. Although I was not otherwise familiar with the Georgia Open Records Act, and although I had never heard of its being used successfully to obtain records in an on-going criminal or habeas proceeding, I agreed that we might use the apparent victory of the broadcasters in *Napper v. Georgia Television Co.*, No. 44381 (Georgia Supreme Court) to request access to the police investigative file in the Frank Schlatt/Dixie Furniture Store case.

14. Late Friday afternoon, May 29, 1987, I contacted Mr. Roy Mays, an Assistant City Attorney with whom I

had had prior contacts, who suggested that I make a formal written request to the Atlanta Bureau of Police Services. He indicated, however, that it was unlikely that any documents would be produced until the Georgia Supreme Court acted on the City's petition for rehearing. I was advised by Mr. Mays that the City had specifically requested in its rehearing position that the Supreme Court reconsider its newly-announced rule that criminal investigation would be deemed "closed" under the Open Records Act even if a habeas corpus proceeding was pending. On Monday, June 1, I hand-delivered a letter to the Chief of Police, requesting "the opportunity to inspect and copy all records in the possession and/or control of the Atlanta Bureau . . . related to the investigation into the slaying of Officer Frank Schlatt in May, 1978." (See Federal Petition, Exhibit Q).

15. On June 4, I was contacted by Deborah Floyd, an Associate City Attorney, who informed me that the Georgia Supreme Court's decision on June 3, modifying its earlier *Napper* opinion, would have some bearing on whether any or all documents would be released. She indicated that preliminarily she had flagged approximately 97 documents as subject to potential privacy concerns under the modified decision of June 3. At her request, I agreed to a short extension of time.

16. On June 10, I telephoned Roy Mays and Deborah Floyd and stressed the urgency of my request. When asked to specify documents I was interested in, I replied that my first priority was any documents relating to Offie Gene Evans. Deborah Floyd happened to recall one such document in the file, and the City agreed to

furnish that one document while awaiting further clarification from the Supreme Court in the *Napper* litigation. (By that time, the Georgia broadcasters had filed their own petition for rehearing). At the time the City agreed to make this "memo" available, I had no idea what the document was, or what information it contained. It was in this manner that I came into possession of the August 1, 1978 statement of Offie Gene Evans.

17. Since filing the First Amendment to the state habeas petition, the State has pointed to a number of references in the transcript which, the State contends, should have made the existence of this written statement obvious to me. Its existence was not obvious to me, prior to June 10, 1987, when I received a copy from the City Attorney's office. Prior to that time, I simply did not understand that there was a written statement from Evans.

18. In preparing for both the initial cert petition in June, 1980, and the initial state habeas petition in January, 1981, I had reviewed the 1037-page transcript of trial. I had also reviewed the Georgia Supreme Court's decision on direct appeal. I was left with the distinct impression that there was nothing in writing related to Offie Gene Evans that the State was withholding. This impression was based, I believe, on the trial court's own reference – when John Turner was seeking production of additional documents – that "I don't know that we are talking about any written statement." (Tr., 831). Further, the Georgia Supreme Court, on direct appeal, upheld the denial of access to Evans's oral statement without a hint that any written pre-trial statement by Evans existed. The Supreme Court explicitly stated that "the evidence

[defense counsel] sought to inspect was introduced to the jury in its entirety." This was in obvious reference to the actual oral testimony of Evans at trial, further reinforcing my impression that there was nothing written that the State had not produced.

19. The State has also argued that the trial court's order of September 27, 1978 should have served notice on me that there was a written statement. However, that order makes no reference to the witness Offie Gene Evans (or any other witness) and I have no recollection of connecting that September, 1978 order with any witness statements. My own recollection is that my investigation indicated that the order related to a test of hair samples that were taken from each of the co-defendants. I certainly did not connect that order to Offie Gene Evans.

20. The State also contends that a passing comment from the Russell Parker, the Assistant District Attorney who tried the case, made during his deposition taken in the first state habeas hearing, should have been notice to me of the existence of a written statement from Evans. Parker's comment, at page 8 of the deposition, however, was not directly responsive to my question, and I thought he misunderstood my question. I do not believe I actually understood what he said in response to my question, and I rephrased the question to make certain that he understood me. When the deposition transcript became available to me for review, I already had Nick Dumich's letter reflecting his understanding that what we were dealing with was a complete copy of the prosecutor's file. It never occurred to me at this state in the proceedings that there was a written statement from Offie Evans that the State had not produced.

This 8th day of July, 1987.

/s/ Robert H. Stroup
ROBERT H. STROUP

Sworn to and subscribed before me,
this 8th day of July, 1987.

/s/ Alice M. Lewis
Notary Public

Notary Public Georgia State at Large
My Commission Expires June 25, 1988

FEDERAL HABEAS CORPUS TRANSCRIPT

(U.S. District Court, N.D.Ga.)
(No. C-87-1517-A)

July 8, 1987

(Caption Omitted In Printing)

* * *

[28] Robert H. Stroup, called as a witness on behalf of the petitioner, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BOGER:

Q. Mr. Stroup, are you presently one of the counsel for Warren McCleskey, the petitioner in this matter?

A. I am.

Q. When did you first become counsel in this case?

A. April of 1980.

Q. Under what circumstances?

A. I was contacted by Patsy Morris of the ACLU asking me if I would agree to represent Warren McCleskey on his post-conviction proceedings.

Q. At that point, what were the stage – what was the stage [29] of his proceedings?

A. The Georgia Supreme Court decision on direct appeal had been issued in, I believe, January of 1980, and there was a cert. petition that needed to be filed to the U.S. Supreme Court.

Q. Did you prepare that petition?

A. Yes, I did.

Q. What kinds of claims did you investigate at that time with respect to the certiorari petition?

A. My recollection is that the the [sic] claims were based on claims that were raised on direct appeal by John Turner.

Q. Do you recall why you so limited yourself?

A. Well, it was my understanding that I was restricted to the issues that had been raised on direct appeal.

Q. Restricted in what forum?

A. In the – in the Supreme Court, in the United States Supreme Court, that the cert. issues needed to be issues that had been raised on direct appeal to the Georgia Supreme Court.

Q. Did you, in fact, ultimately file that petition?

A. Yes, I did.

Q. Was it granted or denied?

A. It was denied in October of '80.

Q. Did you at some point thereafter begin to prepare any further documents or pleadings for Mr. McCleskey?

A. Right. Actually, some amount of investigation had gone [30] on while the cert. petition was pending.

Q. Toward what end? What –

A. Anticipating a – a habeas corpus proceeding in state court.

Q. And what was the scope of your investigation, generally speaking, in preparation for that state habeas corpus filing?

A. Well, I spoke with – just generally speaking what did I do to get –

Q. Yes, let's talk generally and then focus more specifically on the possible Massiah or Henry claims.

A. Well, I spoke with the client several times. I read the transcript. I am certain I read the transcript of the trial prior to filing the – the cert. petition in the United States Supreme Court. I am certain that I reread that transcript again at some time prior to the filing of the state habeas petition. I sort of, as I read, I was trying to identify issues, both issues that had been raised or suggested on directed appeal as well as new issues that had not been raised and –

Q. Ultimately, for the record, how many issues did you present to the state hey (sic) habeas corpus court?

A. In excess of 20. The precise number I can't say, 22 maybe. I think it depends, in part, on how you count the paragraphs and whether a particular paragraph counts as a separate issue or is encompassed in a prior paragraph.

[31] Q. But over 20. The District Court has noted that Mr. Evans, one of the witnesses at trial against your client, Warren McCleskey, had been a cellmate at some point prior to the trial and had ultimately given testimony against Mr. McCleskey. At any point did it occur to you that there might be a so-called Massiah or Henry claim to be raised?

A. Yes, it did, and it occurred during this investigation for the state habeas hearing. It was suggested to me just on the sort of the bear (sic) facts that we had, which were not many, that is, that he was – that Evans was assigned to the cell immediately adjacent to Warren McCleskey. I wondered about the circumstances of that, particularly as it related – particularly because McCleskey was in solitary.

Q. Let me ask you, Mr. Stroup, did you take your suspicion a step further and contact anyone to find out information about a possible relationship?

A. Yes, I – I interviewed a number of – I spoke with a couple of Atlanta Bureau of Police Services Officers, the people who I knew just from my prior litigation, the Atlanta Bureau of Police Services, for the purpose of getting background information on how I might go about reasonably developing factual evidence in support of a claim.

Q. Let me just make the record clear. You mentioned prior litigation with the Atlanta Bureau of Police Services. That was unrelated to this case?

[32] A. Yes. I had been for a number of years counsel in a title seven proceeding that involved the Atlanta Bureau of Police Services.

Q. All right. Did you at any point speak with any particular officers of the Atlanta Bureau of Police Services about the relationship between Offie Evans and their department?

A. I think my conversations with the Atlanta Bureau of Police Services personnel was, basically, along

the lines of – my recollection at this point is that my conversations were along the lines of, if Evans is an informer, how would I – well, no. First of all, given the practices of the Bureau, is there reason to think that Evans could be a – an informer planted there in the cell, and if so, how would I go about developing factual support for that.

Q. And did you receive any answers to those questions?

A. Right, I – I, in fact, was told that – that it would not be surprising for that to have occurred, and the suggestion was I needed to speak with a number of people at the – who were deputies at the Fulton County Jail regarding what information they would have.

Q. Now, these are deputy sheriffs serving under the sheriff who are at the jail?

A. That was my understanding.

Q. Did you speak with such jailers?

[33] A. I know that I spoke with two people who were specifically identified to me as people who might have information, and I had a third name. I am unable to state at this point whether I ever was able to make contact with him. I know I made efforts to contact him but whether – I can't say at this time whether I actually spoke with him or not.

Q. So you spoke with at least two. Did either one of you get – did either one of them give you information respecting Mr. Evans' status as an informant?

A. No, they – none of them had any information. Basically, they had no recollection of the circumstances regarding how Evans came to be assigned to the jail cell that he was assigned to or of any conversations with the Atlanta Bureau of Police Services Detectives regarding Offie Evans' assignment to that jail cell.

Q. Now, there's been some representations this morning that at some point a deposition of Russel Parker, the assignment district attorney in this case, was taken. Did you take that deposition?

A. Yes, I did.

Q. Do you recall when it was?

A. It was – my recollection is that it was mid February of '81. It was after the hearing that he had in Butts Superior Court on the first State Habeas Hearing, which I recall was late January, maybe January 30th.

[34] Q. Was the record – forgive me. Was the record still open for inclusion of this deposition in the State Habeas proceeding?

A. Yes. Yes.

Q. During –

A. Mr. Parker was not available to come to the hearing itself, and the record had been held open for his deposition.

Q. During that deposition, did you question Mr. Parker about whether there had been an informant relationship between Mr. Evans and the Atlanta Bureau of Police Services or the prosecutor's office?

A. Yes, I did.

Q. Do you recall his answers?

A. I – I asked I don't recall the specific question, but there is a question in there about police informer.

Q. If you don't recall, let me ask you, if I might, if I can approach the bench, if I can show counsel, my witness, a copy of the document. Can you identify that document?

A. Yes. It's a copy of the deposition of Russell Parker that was taken as part of the proceedings for the first state habeas.

Q. Does that refresh your recollection about when it was taken?

A. Right, it says February 16th.

Q. 1981? Let me direct your attention to the bottom of [35] page 14 of that deposition.

A. Yes, I asked –

Q. No, who is questioning at this point?

A. The – it's – actually, it seems to be examination by Nick Dumich.

Q. And who is Nick Dumich?

A. He's the assistant attorney general who was representing the state in this proceeding.

Q. Do you recall the question and the answer now that you have reviewed these documents?

A. Well, it indicates that Nick asked Russ Parker, do you have any knowledge that Mr. Evans was working as

an informant for the Atlanta police or any police authorities when he was placed in the Fulton County Jail and when he overheard these conversations of Mr. McCleskey?

Q. And what was the –

A. And the answer was, I don't know of any instance that Offie Evans had worked for the Atlanta police department as an informant prior to his overhearing conversations at the Fulton County Jail.

Q. Did you have any reason to doubt Mr. Parker's testimony at that point?

A. No.

Q. You indicated that you had – you were suspicious and you made some prehearing attempts to develop evidence. At any [36] point, did you file a claim based on Massiah?

A. Right. Well – Yeah, I wish I had looked at the pleadings more recently, but my recollection is that I amended the state habeas petition to specifically include a paragraph where I viewed myself as raising a Henry Claim, a U.S. versus Henry Claim, quite specifically.

Q. At that point, did you have substantive evidence acquired from your suspicions to support it?

A. Right. At the time all I had was the – the bare bones kind of evidence that I had. My recollection is I – I filed the petition and then realized that I still might very well be able to develop something in support of it and that I should include it and, therefore, amend it to add that paragraph.

Q. During – during the state habeas proceeding, did you make any inquiries with respect to Offie Evans on this issue?

A. I did try to develop on my examination with Offie Evans the – the matter of the circumstances for his being placed in solitary confinement and specific questions about who the arresting officer who his arresting officer was, in an effort to then further develop the circumstances surrounding his arrest and placement in solitary.

Q. Were those efforts successful? Did any evidence come out?

A. No, he had no recollection of who the arresting officer was, and he had no notion as to the reasons for his being [37] placed in solitary confinement. At least that's what his testimony was.

THE COURT: Was this on deposition or at the hearing?

THE WITNESS: No, no, that is at the State habeas hearing.

BY MR. BOGER:

Q. Had you made attempts prior to the state hearing to speak to Mr. Evans?

A. Actually, Yes, I had. Mr. Evans, we had – I had substantial problems identifying – locating Offie Evans prior to the State habeas hearing, and I spent much more time than I would have liked in the – in that time period, that month or month and a half time period prior to trial,

trying to locate him. It turned out, actually, that he was in the – in Jackson, and –

Q. By that you mean the Georgia Diagnostic Center?

A. Right.

Q. Let me – let me –

A. But on some peculiar circumstance such that he wasn't showing up on the State system, and when we – or when we – when we made inquiry – and I'm sorry, I really have forgotten the details, but even though we were making inquiries, we weren't asking the right question or somehow at any rate we kept – you know, we – they.

Q. Your efforts were unsuccessful?

[38] A. Right.

Q. Let me just summarize your testimony and ask you one –

A. No, no, I should say – no, no, I did then locate him like very close to the date of the hearing, six, seven days, I don't know, prior to th hearing, actually long enough in advance that we were able to get a writ issued by the Butts Superior Court for him to be brought to the state habeas hearing but not – just – there really wasn't enough time, given the press of my – the ordering of my priorities to get in and interview him prior to the hearing.

Q. So you attempted during the hearing to speak to him. You indicated that in a deposition Mr. Parker had indicated he knew of no such relationship. You had spoken with Atlanta Police Bureau officials who pointed you toward Fulton County.

MS. WESTMORELAND: Your Honor, I'll object to Mr. Boger summarizing the testimony of counsel, his own witness can testify for himself.

THE COURT: Sustain the objection.

BY MR. BOGER:

Q. Mr. – Mr. Stroup let me ask you one additional question on this line. During the hearing, did you attempt any other efforts to substantiate even inferentially an informant relationship between Mr. Evans and the State?

A. Well, I – excuse me. I though in – and the deposition record will really speak for itself. I'd have to [39] look at it. I thought I had some examination of Russell Parker directly as opposed to Nick Dumich's questions along the lines of what his – his own relationship was with Offie Evans prior to July of 1978.

MR. BOGER: Your Honor, we can do this one of two ways. I can either refresh his recollection through various pages, or we can submit the document, which the state is well aware of and has made reference to. It appears to me it might speed things if we simply submit the document because I think what it will reflect is some questions of that sort, but I'd offer it into evidence.

THE COURT: I think we need it in the record but while you've got him on the stand. Ms. Westmoreland?

MS. WESTMORELAND: Your Honor, I was just going to comment, as we noted previously, I believe this was submitted as respondent's exhibit number six in the first federal habeas proceeding, if it would simplify things to have an additional copy presented in the record

of this case, we have absolutely no objection and certainly, agree to having that submitted.

THE COURT: Well, at some point put it in as your 3, but right now while you've got him so he can talk about what he sees, refresh his recollection and ask him to –

BY MR. BOGER:

Q. Let me direct your attention to pages nine and following of the deposition, Mr. Stroup. If you could review those pages [40] and then having reviewed them use your recollection to testify further. Actually, perhaps I misdirected you. If you could begin at page eight.

A. Well, yes, in response to your question. I did ask Russell Parker during his deposition specifically as to his own involvement with Offie Evans, whether he had any prior dealings with Evans prior to his – what I meant was Evans' becoming involved in the Frank Schlatt case, and he indicated that, no, he didn't know Evans prior to that time, and there was also some examination regarding what, if anything, Parker knew regarding Atlanta police detectives and their contacts with Offie Evans.

Q. Let me – let me ask you further now, during the state habeas proceeding itself, did you question Mr. Evans about any other relationships he may have entered into with respect to the state?

A. Yes. Actually, the other piece of information that we had on an informer kind of relationship involving Offie Evans was a situation that occurred after McCleskey's trial, in which Evans appeared at a trial in Fulton County with Russ Parker as the District Attorney.

Q. That's the same Russell Parker as the District Attorney in Mr. McCleskey's case?

A. Right, in which Offie Evans' testimony basically was that while in Fulton County jail he received a jailhouse [41] confession from the defendant.

Q. By the defendant, you mean the defendant in the other case?

A. The defendant in that case.

Q. What did you proffer that for?

A. Well, we – that's the only other bit of information that we've been able to develop, and we did offer that evidence at the state habeas hearing for whatever inferential value it had of – as to Evans' relationship, recognizing that it was a relationship after the McCleskey trial, but, nonetheless, it was what we had of a concrete nature and we did present that evidence through cross-examination of Offie Evans at the state habeas hearing.

Q. Did the state – the state habeas court admit that evidence?

A. I don't recall at this point.

Q. Let me, if I might, approach the witness, give you a document, and see if it will help you refresh your recollection.

MS. WESTMORELAND: Once again for the court's reference, I believe the state habeas transcript is in the first federal proceedings as respondent's Exhibit No. 5.

THE COURT: All right.

BY MR. BOGER:

Q. Do you recognize this document, Mr. Stroup?

[42] A. Yes. This is a copy of the transcript from the state habeas, the first state habeas proceeding in Warren McCleskey's behalf, and you've directed me to page 123, which is where I begin to examine Offie Evans. I asked him, "Other than the McCleskey trial, have you ever yourself testified that someone had confessed to murder to you?" and it was my effort then to go in and develop that.

Q. Was there any impediment to that effort?

A. There was an objection raised.

Q. By whom?

A. The state.

Q. On grounds of what?

A. On the grounds of relevancy, and I indicated that we'd raised the Sixth Amendment claim based on the recent Supreme Court case, United States versus – the court reporter identifies it as United States versus Tanner, which may be my – her reading of my accent, I suppose, relating to the use of informers and a paid informer, and I went on to say that the line of questioning is simply to develop a pattern in this case that amounts to a paid informer being assigned to the Fulton County jail in a situation where he can, in one fashion or another, elicit incriminating evidence from persons within the custody of the Fulton officials.

And Mr. Dumich indicated that there was no testimony that he was a paid informer at all. I again argued

that we [43] were trying to show a pattern. There's a further objection on relevancy by Nick Dumich, and then the court inquired as to whether he had ever testified in a case before you testified in McCleskey's case about something somebody had told you in prison and –

Q. By "he" you mean Evans at this point?

A. Right. And Offie Evans indicated, "no." And, actually, then there is further – a further exchange between the Court and myself, and then at 126 I do resume questioning regarding his subsequent testimony at the trial of another defendant with Russ Parker as the District Attorney handling the case.

THE COURT: So you were allowed to inquire?

BY MR. BOGER:

Q. Apart from that substantive active evidence –

THE COURT: That's a question. You were then allowed to

THE WITNESS; Yes, it appears that I was.

THE COURT: All right.

BY MR. BOGER:

Q. Apart from that substantive evidence of subsequent testimony by Mr. Evans, were you able to develop any other evidence in support of a Henry, Massiah claim?

A. None that I can recall.

Q. Were you aware of any written statement by –

THE COURT: Let me stop you there.

Q. – Offie Evans?

[44] THE COURT: Let's take a morning recess now, be in recess about 15 minutes.

* * *

(Whereupon, a brief recess was had.)

THE COURT: During the recess, I flipped through the federal – my decision in the 1st habeas, and I don't see a Massiah issue raised.

MR. BOGER: I was going to –

THE COURT: Does the petitioner contend that it was raised?

MR. BOGER: No, Your Honor, I was going to get to that next.

THE COURT: Okay.

Q. Mr. Stroup let me pursue that line of questioning now. You indicated that you had filed an amendment to the state habeas petition raising a Massiah Henry type of claim. Did you advance that claim subsequent to the federal or to the state habeas corpus hearing?

A. The claim was not carried over into the federal habeas petition.

Q. Why not?

A. I think that I looked at what we had been able to develop in support of the claim factually in the state habeas proceeding and made the judgment that we didn't have the facts to support the claim and, therefore, did not bring it into [45] federal court.

Q. Did you carry over any related claims such as the Giglio versus United States claim?

A. We did think that we had a very good claim involving Offie Evans.

THE COURT: Giglio claim?

THE WITNESS: Right.

BY MR. BOGER:

Q. Mr. Stroup, let me ask you a few additional questions. At the time of the state habeas corpus proceeding, did you have any knowledge of any written statement that had been made by Offie Evans?

A. No.

Q. Did you have any knowledge at the time of the federal hearing of any such statement?

A. No.

Q. When was the first time that you are aware that there was a written statement by Offie Evans given to the police?

A. The first time I knew about it was about 4:30 in the afternoon on July 10th – June 10th of 1987, and I opened up an envelope that I had picked up from the City Attorney's office as I was going down the elevator to sort of read what it was I had picked up. I was taking the elevator down, and I opened it up and saw that 21 page statement from Offie Evans.

Q. One final question, at the time of the state habeas [46] corpus hearing, who was actively involved in the

investigation and the presentation of evidence at the hearing and at the deposition in concert with you?

A. At the state – at the state habeas hearing?

Q. That's correct.

A. Excuse me. Basically, I did the – I had the major responsibility of – for the first state habeas hearing on Warren McCleskey's behalf. I drafted the petition. I or people in my office did the investigation. You and, excuse me, other lawyers from the Fund were on the pleadings but I did – I know I sent you copies of the pleadings of – I'm not certain at this point that you had involvement through the first state habeas hearing beyond your receipt of the pleadings. I may have on occasion called you with a question, just generally as to a legal issue. I don't have any recollection of that, any specific recollection even of that during the first habeas, but I would not be surprised that I would have done that but basically – I mean, I was the only one – I was the one who conducted the hearing on behalf of McCleskey, I was the one in charge of the investigation, the interviewing of witnesses, the preparation of documents both at the Butts Superior Court level as well as the Georgia Supreme Court level.

MR. BOGER: Your Honor, at this time I don't have any additional questions of Mr. Stroup. I'd like to offer into evidence – the state has indicated it's been in previous [47] submissions in the first habeas, but for the convenience of the Court – the deposition of Russell Parker that's been referred to. That would be petitioner's 3, I believe.

THE COURT: It will be admitted.

MR. BOGER: Thank you.

THE COURT: Anything further of this witness?

MR. BOGER: No, Your Honor.

THE COURT: You may cross.

BY MS. WESTMORELAND:

Q. Mr. Stroup, I believe your testimony was that you talked to some – some members of the Atlanta Bureau of Police Services prior to the first state habeas corpus proceeding; is that correct?

A. Yes.

Q. And you do not recall who those individuals were at this time; is that also correct?

A. No, no, I – I can tell you of two specific persons who I spoke with, whether –

Q. Who did –

A. Whether that's the the complete list or not, I can't tell you.

Q. Who did you speak with?

A. One of the people I spoke with was – he's now Captain Eulis Moore. He at the time may have been a Sergeant. I'm not sure of the timing on his promotion to Captain. And the other [48] Atlanta Police Officer who I know specifically I spoke with was Detective Gresham.

Q. Did you at any time talk with Detective Harris prior to the first state habeas proceeding?

A. No.

Q. Did you talk to Detective Dorsey at any time prior to the first state habeas proceeding?

A. No.

Q. What about investigator. I believe he was, Eskew?

A. No, I did not.

Q. Did you ever talk to Deputy Hamilton?

A. I don't believe so. I don't – I talked with some people also at Fulton County jail. I don't have a specific recollection of Hamilton. It is possible that I spoke with Hamilton.

Q. Did you talk with anyone then who was actually involved in – directly involved with Offie Evans, eliciting his –

A. Yes, that was my understanding, that I was speaking to people at Fulton County jail who were directly involved with Offie Gene Evans. The – I know – I know of two people who I specifically spoke with and a third person who – who was represented to me as possibly having some information. The people who I spoke with, there was a gentleman named Bobby Edwards who by that time had left the Fulton County Sheriff's Department, if I've got the department right. I understood he [49] was at the jail and that he had information or was in a position to have information related to the questions I was asking, the underlying circumstances of Evans' assignment to solitary. He had by that time moved to Helen, Georgia or thereabouts. I – and I think it was – he was – it was represented to me that he was in real estate.

And I was able to find him through a realtor who I know up in that area, and I spoke with him, and he told me he had simply no recollection whatsoever of any of the circumstances.

Q. Once Offie Evans mentioned specifically the name of Dorsey, Detective Dorsey, in his testimony at the state habeas corpus proceeding, did you talk to Detective Dorsey to ascertain if he had any information that might be useful?

A. No, I did not.

Q. And, I believe, during the deposition of Mr. Parker, he mentioned the names of Detective Jowers and Detective Harris. Did you talk to them after that deposition to ascertain if they had any information?

A. At that – no, I did not. At that point in time in the procedure, you know, the – my understanding was the record was closed. I mean, we – we had concluded the evidence in the state habeas hearing. It was left open specifically for Parker and Kelly Fight's depositions, and we were on a briefing schedule.

Q. You did not make any attempt, though, to contact [50] witnesses whose names had been mentioned both by Mr. Evans and by Mr. Parker as having had contact with Mr. Evans?

A. I have – no, I do not believe that I did.

Q. So all you knew was that Mr. Parker had no knowledge of whether these detectives had had any prior contact with Mr. Evans, you did not know whether these detectives themselves had any prior contact with Mr. Evans; is that correct?

A. I believe that's correct, I – let me think. What I had was their testimony at trial, that, you know, these police officer's testimony at trial and Parker's deposition testimony.

THE COURT: Did they testify regarding this subject at trial?

THE WITNESS: I frankly can't say at this point.

MS. WESTMORELAND: Your Honor, I don't recall that they did. I believe the only one who did was chief – was the jailer, Mr. Hamilton, at the rebuttal phase. I don't recall their testimony relating to testimony of Offie Evans at trial specifically.

BY MS. WESTMORELAND:

Q. And as to Deputy Hamilton who did testify at trial and did indicate he was the one, I believe, obtaining the initial contact with Mr. Evans, you did not talk to him prior to the state habeas proceeding; is that correct?

A. Excuse me. I cannot say at this point that I did or did not. It is possible, but I don't have any recollection of [51] doing it.

Q. And you never requested any records from the Atlanta Police Department prior to the first state habeas corpus proceeding; is that correct?

A. I did request records from the Atlanta Police Bureau. They were records related to the race discrimination claim. But I did not request records relating to an informer claim.

MS. WESTMORELAND: All right. I have no further questions, your Honor.

THE COURT: Redirect?

MR. BOGER: No, Your Honor.

THE COURT: All right, sir. Thank you, you may go down, Mr. Stroup.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

(Caption Omitted In Printing)

ORDER

I. INTRODUCTION

Petitioner Warren McCleskey, convicted and sentenced to death in October 1978 for the murder of Police Officer Frank Schlatt during the course of a furniture store robbery,[1] petitions this court for a writ of habeas corpus on seven separate grounds: (1) that the state's non-disclosure of critical impeachment evidence violated his due process rights (the *Giglio* claim); (2) that his capital sentence was the product of intentional racial discrimination in violation of his eighth amendment and equal protection rights (the intentional discrimination claim); (3) that the trial court's denial of funds to employ experts in his defense violated his due process rights (the *Ake* claim); (4) that the use of the petitioner's alleged statements to a jailhouse informant violated his sixth amendment and due process rights (the *Massiah* claim); (5) that the state's failure to correct a witness's misleading testimony violated his eighth amendment and due process rights (the *Mooney* claim); (6) that the state's reference to appellate review in its closing argument violated his eighth amendment and due process rights (the *Caldwell* claim); and (7) that the state's systematic exclusion of black jurors violated his sixth amendment and equal protection rights (the *Batson* claim).

For the reasons discussed below, the petition for a writ of habeas corpus will be granted as to the *Massiah*

claim but denied as to all other claims. In Part II of this order the court will detail the history of the petitioner's efforts to avoid the death penalty. Then, because the successive nature of this petition dominates the court's discussion and will be dispositive of many of the issues raised by the petition, Part III will set out the general principles of finality in habeas corpus actions. Next, the court will address each of the seven claims raised in this petition; first, the successive claims in Part IV (the *Giglio*, intentional discrimination, and *Ake* claims) and then the new claims in Part V (the *Massiah*, *Mooney*, *Caldwell*, and *Batson* claims). Finally, in Part VI, the court will address the petitioner's other pending motions – a motion for discovery and a motion to exceed page limits.

II. HISTORY OF PRIOR PROCEEDINGS.

The petitioner was convicted and sentenced in the Superior Court of Fulton County on October 12, 1978. The convictions and sentences were affirmed by the Supreme Court of Georgia. *McCleskey v. State*, 245 Ga. 108 (1980). The United States Supreme Court then denied a petition for certiorari, *McCleskey v. Georgia*, 449 U.S. 891 (1980). On December 19, 1980, the petitioner filed an extraordinary motion for a new trial in Fulton County Superior Court, but no hearing has ever been held on that motion. On January 5, 1981 the petitioner filed a petition for writ of habeas corpus in the Butts County Superior Court. On April 8, 1981, that court denied all relief. On June 17, 1981 the Georgia Supreme Court denied the petitioner's application for a certificate of probable cause to appeal. The United States Supreme Court again denied a petition for a writ of certiorari *McCleskey v. Zant*. 454 U.S. 1093 (1981).

McCleskey filed his first federal habeas corpus petition in this court on December 30, 1981. This court held an evidentiary hearing in August and October 1983 and granted habeas corpus relief on one issue on February 1, 1984. *McCleskey v. Zant*, 580 F. Supp. 338 (N.D.Ga. 1984). The Eleventh Circuit reversed and denied the habeas corpus petition on January 29, 1985. *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985) (en banc). This time the United States Supreme Court granted certiorari and affirmed the Eleventh Circuit on April 22, 1987. *McCleskey v. Kemp*, ___ U.S. ___, 107 S.Ct. 1756, *petition for rehearing denied*, ___ U.S. ___, 107 S.Ct. 3199 (1987). McCleskey filed a successive petition for a writ of habeas corpus in the Butts County Superior Court on June 9, 1987, and a First Amendment to the Petition on June 22, 1987 (Civil Action No. 87-V-1028). That court granted the state's motion to dismiss the petition on July 1, 1987. The Georgia Supreme Court denied the petitioner's application for a certificate of probable cause to appeal on July 7, 1987 (Application No. 4103).

This court issued an order on June 16, 1987 making the mandate of the Eleventh Circuit the judgment of this court and lifting the stay of execution that had been entered when the first federal habeas corpus petition was filed. On July 7, 1987 McCleskey filed the present petition for a writ of habeas corpus, a request to proceed *in forma pauperis*, a motion for discovery, and a motion for a stay of execution. The court granted the request to proceed *in forma pauperis* and held an evidentiary hearing on the petition on July 8 and 9, 1987. At that time, the court granted the motion for a stay of execution. The court took further evidence in a hearing on August 10, 1987 and, at

the close of the evidence, requested post-hearing briefs from the parties. Those briefs have since been filed and the petitioner's claims are ripe for determination.

III. THE DOCTRINE OF FINALITY IN HABEAS CORPUS PETITIONS.

Although successive petitions for a writ of habeas corpus are not subject to the defense of *res judicata*, Congress and the courts have fashioned a "modified doctrine of finality" which precludes a determination of the merits of a successive petition under certain circumstances. *Bass v. Wainwright*, 675 F.2d 1204, 1206 (11th Cir. 1982). In particular, Congress has authorized the federal courts to decline to address the merits of a petition if the claims contained therein were decided upon the merits previously or if any new grounds for relief that are asserted should have been raised in the previous petition. 28 USC § 2244(a) & (b). The habeas rules have described these distinct applications of the doctrine of finality as follows:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

28 USC foll. § 2254, Rule 9(b).

A purely successive petition or successive claim raises issues which have been decided adversely on a previous petition. The court may take judicial notice of allegations raised by a previous petition. *See Allen v.*

Newsome, 795 F.2d 934, 937 (11th Cir. 1986). Rule 9(b) requires that the issue raised by the previous petition must have been decided adversely to the petitioner on the merits before the doctrine of finality obtains. A merits determination need not be a determination made after an evidentiary hearing if the facts material to the successive claim were undisputed at the time of the previous petition. *Bass*, 675 F.2d at 1206.

A truly successive petition may be distinguished from the second category of petitions subject to the finality doctrine: petitions alleging new claims that may be an "abuse of the writ." 28 USC § 2244(b); 28 USC foll. § 2254, Rule 9(b). The state has the burden of pleading abuse of the writ; the burden then shifts to the petitioner to show that he has not abused the writ. *Price v. Johnston*, 334 U.S. 266, 292-93 (1948); *see also Allen v. Newsome*, 795 F.2d 934, 938-39 (11th Cir. 1986). To meet his burden, a petitioner must "give a good excuse for not having raised his claims previously." *Allen* 794 F.2d at 939. An evidentiary hearing on an abuse of the writ defense is not necessary if the record affords an adequate basis for decision. *Price*, 334 U.S. at 292-93.

As this circuit has articulated the issue presented by an abuse of the writ defense, "[a] district court need not consider a claim raised for the first time in a second habeas petition, unless the petitioner establishes that the failure to raise the claim earlier was not the result of intentional abandonment or withholding or inexcusable neglect." *Adams v. Dugger*, 816 F.2d 1493, 1494 (11th Cir. 1987) (citations omitted). *See also Moore v. Kemp*, 824 F.2d 847, 851 (11th Cir. 1987). There are a number of instances in which failure to raise an issue in a prior petition is

excusable. "A retroactive change in the law and newly discovered evidence are examples." 28 USC foll. § 2254, Rule 9 Advisory Committee Notes. *See, e.g., Ritter v. Thigpen*, 828 F.2d 662, 665 (11th Cir. 1987); *Adams*, 816 F.2d at 1495. Of course, failure to discover evidence supportive of a claim prior to the first petition may itself constitute inexcusable neglect or deliberate bypass. *Cf. Freeman v. Georgia*, 599 F.2d 65, 71-72 (5th Cir. 1979) (no procedural default where petitioner was misled by police and could not have uncovered evidence supportive of a claim in any event).[2]

Even if a particular claim is truly successive or, if it is a new claim, is an abuse of the writ, a court may consider the merits of the claim if "the ends of justice" would be served thereby. *See Sanders v. United States*, 373 U.S. 1, 16 (1963) (successive claim); *id.* at 18 (new claim); *Smith v. Kemp*, 715 F.2d 1459, 1468 (11th Cir. 1983) (successive claim); *Moore v. Kemp*, 824 F.2d at 856 (new claim). The burden is upon the petitioner to show that the ends of justice would be served. *Sanders*, 373 U.S. at 17.

The "ends of justice" exception has been subject to differing interpretations. The Court in *Sanders* suggested some circumstances in which the "ends of justice" would be served by re-visiting a successive claim:

> If factual issues are involved, the applicant is entitled to a new hearing upon a showing that the evidentiary hearing on the prior application was not full and fair; we canvassed the criteria of a full and fair evidentiary hearing recently in *Townsend v. Sain*, [372 U.S. 293 (1963)], and that discussion need not be repeated here. If purely legal questions are involved, the applicant may be entitled to a new hearing upon showing an

> intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application. . . . [T]he foregoing enumeration is not intended to be exhaustive; the test is "the ends of justice" and it cannot be too finely particularized.

373 U.S. at 16-17. This circuit has traditionally followed the *Sanders* articulation of the "ends of justice" exception. *See, e.g., Moore v. Kemp*, 824 F.2d at 856; *Smith v. Kemp*, 715 F.2d at 1468.

A plurality of the Supreme Court recently challenge this open-ended definition of "the ends of justice," arguing that a successive claim should not be addressed unless the petitioner "supplements his constitutional claim with a colorable showing of factual innocence." *Kuhlmann v. Wilson*, ___ U.S. ___, 106 S.Ct. 2616, 2627 (1986) (Opinion of Powell, J., joined by Burger, Rehnquist, and O'Connor, JJ.). Under this definition of the "ends of justice," the petitioner "must make his evidentiary showing even though . . . the evidence of guilt may have been unlawfully admitted." *Id.* That is, petitioner must "show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongfully excluded or to have become available only after trial, the trier of facts would have entertained a reasonable doubt of his guilt." *Id.* n. 17 (quoting Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U.Chi.L.Rev. 142 (1970)).

Following *Kuhlmann*, "[i]t is not certain what standards should guide a district court in determining whether the 'ends of justice' require the consideration of

an otherwise dismissable (sic) successive habeas petition." *Moore*, 824 F.2d at 856. The Eleventh Circuit, in *Moore*, declined to decide "whether a colorable showing of factual innocence is a necessary condition for the application of the ends of justice exception." *Id*. The court merely held that, "at a minimum, the ends of justice will demand consideration of the merits of a claim on a successive petition where there is a colorable showing of factual innocence." *Id*.

IV. PETITIONER'S SUCCESSIVE CLAIMS.

Three of the petitioner's claims in this second federal habeas petition duplicate claims in the first federal petition and are therefore truly successive claims that should be dismissed according to the dictates of Rule 9(b) unless the petitioner can show that the "ends of justice" justify re-visiting the claims. Each claim will be discussed in turn.

A. Giglio Claim

Petitioner's *Giglio* claim is based upon the state's failure to disclose its agreement with a witness, Offie Evans, which led him to testify against petitioner at trial. McCleskey argues that the state's failure to disclose the promise by a police detective to "speak a word" for Offie Evans with regard to an escape charge violated McCleskey's due process rights under *Giglio v. United States*, 405 U.S. 150 (1971). *Giglio* held that failure to disclose the possible interest of a government witness will entitle a defendant to a new trial if there is a reasonable likelihood that the disclosure would have affected

the judgment of the jury. *Id*. at 154. This court granted habeas corpus relief on this claim in passing upon the first federal habeas petition, but the Eleventh Circuit reversed en banc. *McCleskey v. Zant*, 580 F.Supp. at 380-84, *rev'd sub nom. McCleskey v. Kemp*, 753 F.2d at 885.

McCleskey argues that the ends of justice require revisiting his *Giglio* claim for three reasons. He argues that the discovery of a written statement by Offie Evans provides new evidence of a relationship between Offie Evans and the state supportive of a finding of a *quid pro quo* for Offie Evans' testimony. He also proffers the affidavit testimony of jurors who indicate that they might have reached a different verdict had they know the real interest of Offie Evans in testifying against petitioner. Finally, petitioner contends that there has been a change in the law regarding the materiality standard for a finding of a *Giglio* violation.

None of these arguments is sufficient to justify revisiting the *Giglio* claim. The written statement of Offie Evans offers no new evidence of an agreement by state authorities to do Offie Evans a favor if he would testify against petitioner. Consequently, the conclusion of the Eleventh Circuit that the detective's promise did not amount to a promise of leniency triggering *Giglio* is still valid. *See McCleskey v. Kemp*, 753 F.2d at 885. Because the threshold showing of a promise still has not been made, the ends of justice would not be served by allowing petitioner to press this claim again.

Petitioner also has no newly discovered evidence with respect to the materiality of the state's failure to disclose its arrangement with Offie Evans. The affidavit

testimony of the jurors is not evidence that petitioner could not have obtained at the time of the first federal habeas petition. In any event, a juror is generally held incompetent to testify in impeachment of a verdict. Fed. R. Evid. 606(b); *Proffitt v. Wainwright*, 685 F.2d 1227, 1255 (11th Cir. 1982). *See generally McCormick on Evidence* § 608 (3d Ed. 1984).

Finally, petitioner can point to no change in the law on the standard of materiality. The Eleventh Circuit concluded in this case that there was "no 'reasonable likelihood' that the State's failure to disclose the detective's [promise] affected the judgment of the jury." *McCleskey*, 753 F.2d at 884. The same standard still guides this circuit in its most recent decisions on the issue. *See, e.g., United States v. Burroughs*, No. 86-3566, Slip Op. at 381 (11th Cir., Nov. 3, 1987); *Brown*, 785 F.2d at 1464 (citing *McCleskey v. Kemp*, 753 F.2d at 885).

B. Intentional Discrimination Claim.

Having lost in the Supreme Court[3] on his contentions regarding the Baldus Study, the petitioner nevertheless trotted it out to support the more narrow contention that McCleskey was singled out both because he is black and because his victim was white.

The Baldus Study is said to be the most ambitious yet. It is. The part of it that is ambitious, however – the 230-variable model structured and validated by Dr. Baldus – did not adduce one smidgen of evidence that the race of the defendants or the race of the victims had any effect on the Georgia prosecutors' decisions to seek the death penalty or the juries' decisions to impose it. The

model that Dr. Baldus testified accounted for all of the neutral variables did not produce any "death-odds multiplier" of 4 or 6 or 11 or 14 or any of the other numbers which the media have reported.

To be sure, there are some exhibits that would show discrimination and do contain such multipliers. But these were not produced by the "ambitious" 230-variable model of the study. The widely-reported "death-odd multipliers" were produced instead by arbitrarily structured little rinky-dink regressions that accounted for only a few variables. They are of the sort of statistical analysis given short shrift by courts and social scientists alike in the past. They prove nothing other than the truth of the adage that anything may be proved by statistics.

The facts are that the only evidence of over-zealousness or improprieties by any person(s) in the law enforcement establishment points to the black case officers of the Atlanta Bureau of Police Services,[4] which was then under the leadership of a black superior who reported to a black mayor in a majority black city. The verdict was returned by jury on which a black person sat and, although McCleskey has adduced affidavits from jurors on other subjects, there is no evidence that the black juror voted for conviction and the death penalty because she was intimidated by the white jurors. It is most unlikely that any of these black citizens who played vital roles in this case charged, convicted or sentenced McCleskey because of the racial considerations alleged.

There is no other evidence that race played a part in this case.

C. Ake Claim.

Petitioner's last truly successive claim is based upon the trial court's denial of his request for the provision of funds for experts, particularly for a ballistics expert. Petitioner alleges that this ruling by the trial court denied him his right to due process of law as guaranteed by the fourteenth amendment Petitioner raised this same claim in the first federal habeas petition and this court held that the claim was without merit. *McCleskey v. Zant*, 580 F. Supp. at 388-89 (citing *Moore v. Zant*, 722 F.2d 640 (11th Cir. 1983)). At that time the law held that the appointment of experts was generally a matter within the discretion of the trial judge and could not form the basis for a due process claim absent a showing that the trial judge's decision rendered the defendant's trial fundamentally unfair. *Moore*, 772 F.2d at 648. With that case law in mind, this court concluded that the state trial court had not abused its discretion because the petitioner had the opportunity to subject the state's ballistics expert to cross-examination and because there was no showing of bias or incompetence on the part of the state's expert. *McCleskey v. Zant*, 580 F. Supp. at 389.

Arguing that the ends of justice require re-visiting the claim, petitioner points to the cases of *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) and *Caldwell v. Mississippi*, 472 U.S. 320, 323 n. 1 (1985) (plurality), as examples of a change in the law regarding the provision of experts. It may be that these cases did change the law; this matter, which was traditionally thought to rest within the discretion of state trial judges, now has heightened constitutional significance. *Compare Moore v. Zant*, 722 F.2d at 648, *with Moore v. Kemp*, 809 F.2d 702, 709-12 (11th Cir. 1987).

Even so, this new law does not justify re-visiting this claim. The new Supreme Court cases require "that a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial. Thus, if a defendant wants an expert to assist his attorney in confronting the prosecution's proof . . . he must inform the court of the nature of the prosecution's case and how the requested expert would be useful." *Moore v. Kemp*, 809 F.2d at 712. A review of the state trial record indicates that petitioner did nothing more than generally refer to the extensive expert testimony available to the state. Petitioner then specifically requested the appointment of a *psychiatric* expert. The petitioner never specifically requested the appointment of a ballistic expert, nor did he make the showing that this circuit has held is required by *Ake* and *Caldwell*. The state trial court could hardly have been expected to appreciate the importance of a ballistics expert to petitioner's case if petitioner himself neither requested such an expert nor explained the significance of such an expert to the court.

V. PETITIONER'S NEW CLAIMS.

A. Massiah Claim.

1. Findings of Fact.

Petitioner relies primarily on the testimony of Ulysses Worthy before this court and the recently disclosed written statement of Offie Evans to support his *Massiah* claim. Ulysses Worthy, who was captain of the day watch at the Fulton County Jail during the summer

of 1978 when petitioner was being held there awaiting his trial for murder and armed robbery, testified before this court on July 9 and August 10, 1987. The court will set out the pertinent parts of that testimony and then summarize the information it reveals.

On July 9, Worthy testified as follows: He recalled "something being said" to Evans by Police Officer Dorsey or another officer about engaging in conversations with McCleskey (II Tr. 147-49).[5] He remembered a conversation, where Detective Dorsey and perhaps other officers were present, in which Evans was asked to engage in conversations with McCleskey (II Tr. 150). Later, Evans requested permission to call the detectives (II Tr. 151). Assistant District Attorney Russell Parker and Detective Harris used Worthy's office to interview Evans at one point, which could have been the time they came out to the jail at Evans' request (*Id.*).

In other cases, Worthy had honored police requests that someone be placed adjacent to another inmate to listen for information (II Tr. 152); such requests usually would come from the officer handling the case (*Id.*); he recalled specifically that such a request was made in this case by the officer on the case (II Tr. 153). Evans was put in the cell next to McCleskey at the request of the officer on the case (*Id.*); "someone asked [him] to specifically place Officer Evans in a specific location in the Fulton County Jail so he could overhear conversations with Warren McCleskey," but Worthy did not know who made the request and he was not sure whether the request was made when Evans first came into the jail (II Tr. 153-54); he did not recall when he was asked to move Evans (II Tr. 155-56).

On August 10, 1987 Worthy testified as follows: Evans was first brought to his attention when Deputy Hamilton brought Evans to Worthy's office because Evans wanted to call the district attorney or the police with "some information he wanted to pass to them" (III Tr. 14). The first time the investigators on the Schlatt murder case talked to Evans was "a few days" after Evans' call (III Tr. 16-17). That meeting took place in Worthy's office (III Tr. 17). Worthy was asked to move Evans "from one cell to another" (III Tr. 18). Worthy was "not sure" who asked, "but it would have had . . . to have been one of the officers," Deputy Hamilton, or Evans (III Tr. 18-19). Deputy Hamilton asked Worthy to move Evans "perhaps 10, 15 minutes" after Evans' interview with the investigators (III Tr. 20). This was the first and only time Worthy was asked to move Evans (*Id.*). Deputy Hamilton would have been "one of the ones" to physically move Evans (III Tr. 22). Worthy did not know for a fact that Evans was ever actually moved (*Id.*). The investigators later came out to interview Evans on other occasions, but not in Worthy's presence (III Tr. 23). Neither Detectives Harris, Dorsey or Jowers nor Assistant District Attorney Parker ever asked Worthy to move Evans (III Tr. 24).

On cross-examination, Worthy re-affirmed portions of his July 9 testimony: He overheard someone ask Evans to engage in conversation with McCleskey at a time when Officer Dorsey and another officer were present (III Tr. 32-33). Evans requested permission to call the investigators after he was asked to engage in conversation with McCleskey (III Tr. 33). Usually the case officer would be the one to request that an inmate be moved and that was the case with Evans, though he does not know exactly

who made the request (III Tr. 46-48). Worthy also contradicted portions of his July 9 testimony, stating that the interview at which Assistant District Attorney Parker was present was the first time Evans was interviewed and that Worthy had not met Officer Dorsey prior to that time (III Tr. 36). On further cross-examination, Worthy testified as follows: Deputy Hamilton was not a case officer but was a deputy at the jail (III Tr. 49). When Worthy testified on July 9 he did not know what legal issues were before the court (III Tr. 52-53). After his July 9 testimony he met with the state's attorneys on two occasions for a total of forty to fifty minutes (III Tr. 53-54). After his July 9 testimony he read a local newspaper article mentioning him (III Tr. 56).

In response to questions from the court, Worthy stated that he was satisfied that he was asked for Evans "to be placed near McCleskey's cell," that "Evans was asked to overhear McCleskey talk about this case," and that Evans was asked to "get some information from" McCleskey (III Tr. 64-65). Worthy maintained that these requests were made on the date that Assistant District Attorney Parker interviewed Evans, but he could not explain why the investigators would have requested a move on the same day that Evans had already told the investigators that he was next to McCleskey, that he had been listening to what McCleskey had been saying, and that he had been asking McCleskey questions (III Tr. 64).

In summary, Worthy never wavered from the fact that someone, at some point, requested his permission to move Evans to be near McCleskey. Worthy's July 9 testimony indicates the following sequence: The request to

move Evans, the move, Evans' request to call the investigators, the Parker interview, and other later interviews. Worthy's August 10 testimony indicates a different sequence: Evans' request to call the investigators, the Parker interview, the request to move Evans by Deputy Hamilton, and other later interviews. Worthy's testimony is inconsistent on Officer Dorsey's role in requesting the move, on whether Deputy Hamilton requested the move, and on whether the request to move Evans preceded Evans' request to call the investigators. Worthy has no explanation for why the authorities would have requested to move Evans after the Parker interview, at which Evans made it clear that he was already in the cell adjacent to McCleskey's.

All of the law enforcement personnel to whom Worthy informed – Deputy Hamilton, Detectives Dorsey, Jowers and Harris, and Assistant District Attorney Parker – flatly denied having requested permission to move Evans or having any knowledge of such a request being made (III Tr. 68-71); 80-81, 95; 97-98; 102-03; 111-12, 116). It is undisputed that Assistant District Attorney Parker met with Evans at the Fulton County Jail on only one occasion, July 12, 1978, and that Evans was already in the cell next to McCleskey's at that time (III Tr. 113-14; 71-72).

Petitioner also relies on Evans' twenty-one page statement to the Atlanta Police Department, dated August 1, 1978, in support of his claim that the authorities deliberately elicited incriminating information from him in violation of his sixth amendment right to counsel. Evans' statement relates conversations he overheard between McCleskey and McCleskey's co-defendant DuPree and conversations between himself and

McCleskey from July 9 to July 12, 1978. McCleskey's statements during the course of those conversations were highly incriminating. In support of his argument that the authorities instigated Evans' information gathering, McCleskey points to the methods Evans used to secure McCleskey's trust and thereby stimulate incriminating conversation. Evans repeatedly lied to McCleskey, telling him that McCleskey's co-defendant, Ben Wright, was Evans' nephew; that Evans' name was Charles; that Ben had told Evans about McCleskey; that Evans had seen Ben recently; that Ben was accusing McCleskey of falsely identifying Ben as the "trigger man" in the robbery; that Evans "used to stick up with Ben too;" that Ben told Evans that McCleskey shot Officer Schlatt; and that Evans was supposed to have been in on the robbery himself.

In addition, McCleskey argues that Evans' knowledge that McCleskey and other co-defendants had told police that co-defendant Ben Wright was the trigger person demonstrates Evans' collusion with the police since that fact had not been made public at that time. Finally, McCleskey points to two additional pieces of evidence about Evans' relationship with the police: Evans testified at McCleskey's trial that he had talked to Detective Dorsey about the case before he talked to Assistant District Attorney Parker (Pet. Exh. 16 at 119); and Evans had acted as an informant for Detective Dorsey before (II Tr. 52-3).

The factual issue for the court to resolve is simply stated: Either the authorities moved Evans to the cell adjoining McCleskey's in an effort to obtain incriminating information or they did not. There is evidence to support the argument that Evans was not moved, that he was in

the adjoining cell fortuitously, and that his conversations with McCleskey preceded his contact with the authorities. Worthy's testimony is often confused and self-contradictory, it is directly contrary to the testimony of Deputy Hamilton and Detective Dorsey, it is contrary to Evans' testimony at McCleskey's trial that he was put in the adjoining cell "straight from the street" (Trial Tr. 873), and it is contrary to the opening line of Evans' written statement which says, "I am in the Fulton County Jail cell # 1 north 14 where I have been since July 3, 1978 for escape." Worthy himself testified that escape risks where (sic) housed in that wing of the jail (III Tr. 13-14). Moreover, the use of Evans as McCleskey alleges, if it occurred, developed into a complicated scheme to violate McCleskey's constitutional rights – its success required Evans and any officers involved to lie and lie well about the circumstances. For these reasons, the state asks this court to reject Worthy's testimony that someone requested permission to move Evans next to McCleskey's cell.

After carefully considering the substance of Worthy's testimony, his demeanor, and the other relevant evidence in this case, the court concludes that it cannot reject Worthy's testimony about the fact of a request to move Offie Evans. The fact that someone, at some point, requested his permission to move Evans is the one fact from which Worthy never wavered in his two days of direct and cross-examination. The state has introduced no affirmative evidence that Worthy is either lying or mistaken. The lack of corroboration by other witnesses is not surprising; the other witnesses, like Assistant District Attorney Parker, had no reason to know of a request to

move Evans or, like Detective Dorsey, had an obvious interest in concealing any such arrangement. Worthy, by contrast, had no apparent interest or bias that would explain any conscious deception. Worthy's testimony that he was asked to move Evans is further bolstered by Evans' testimony that he talked to Detective Dorsey before he talked to Assistant District Attorney Parker and by Evans' apparent knowledge of details of the robbery and homicide known only to the police and the perpetrators.

Once it is accepted that Worthy was asked for permission to move Evans, the conclusion follows swiftly that the sequence of events to which Worthy testified originally must be the correct sequence; i.e., the request to move Evans, the move, Evans' request to call the investigators, the Parker interview, and other later interviews. There are two other possible conclusions about the timing of the request to move Evans, but neither is tenable. First, the request to move Evans could have come following Evans' meeting with Assistant District Attorney Parker, as Worthy seemed to be testifying on August 10 (III Tr. 20). However, a request at that point would have been non-sensical because Evans was already in the cell adjoining McCleskey's. Second, it could be that Evans was originally in the cell next to McCleskey, that he overheard the incriminating statements prior to any contact with the investigators, that McCleskey was moved to a different cell, and that the authorities then requested permission to move Evans to again be adjacent to McCleskey. As the state concedes, this possibility is mere speculation and is not supported by any evidence in the record. Post-Hearing Brief at 53.

For the foregoing reasons, the court concludes that petitioner has established by a preponderance of the evidence the following sequence of events: Evans was not originally in the cell adjoining McCleskey's; prior to July 9, 1978, he was moved, pursuant to a request approved by Worthy, to the adjoining cell for the purpose of gathering incriminating information; Evans was probably coached in how to approach McCleskey and given critical facts unknown to the general public; Evans engaged McCleskey in conversation and eavesdropped on McCleskey's conversations with DuPree; and Evans reported what he had heard between July 9 and July 12, 1978 to Assistant District Attorney Parker on July 12.

2. Abuse of the Writ Questions.

The state argues that petitioner's *Massiah* claim in this second federal habeas petition is an abuse of the writ because he intentionally abandoned the claim after his first state habeas petition and because his failure to raise this claim in his first federal habeas petition was due to inexcusable neglect. As was noted earlier, the burden is on petitioner to show that he has not abused the writ. *Allen*, 795 F.2d at 938-39. The court concludes that petitioner's *Massiah* claim is not an abuse of the writ.

First, petitioner cannot be said to have intentionally abandoned this claim. Although petitioner did raise a *Massiah* claim in his first state petition, that claim was dropped because it was obvious that it could not succeed given the then-known facts. At the time of his first federal petition, petitioner was unaware of Evans' written

statement, which, as noted above, contains strong indications of an *ab initio* relationship between Evans and the authorities. Abandoning a claim whose supporting facts only later become evident is not an abandonment that "for strategic, tactical, or any other reasons . . . can fairly be described as the deliberate by-passing of state procedures." *Fay v. Noia*, 372 U.S. 391, 439 (1963), quoted in *Potts v. Zant*, 638 F.2d 727, 743 (5th Cir. 1981). Petitioner's *Massiah* claim is therefore not an abuse of the writ on which no evidence should have been taken. This is not a case where petitioner has reserved his proof or deliberately withheld his claim for a second petition. *Cf. Sanders v. United States*, 373 U.S. 1, 18 (1963). Nor is the petitioner now raising an issue identical to one he earlier considered without merit. *Cf. Booker v. Wainwright*, 764 F.2d 1371, 1377 (11th Cir. 1985).

Second, petitioner's failure to raise this claim in his first federal habeas petition was not due to his inexcusable neglect. When the state alleges inexcusable neglect, the focus is on "the petitioner's conduct and knowledge at the time of the preceding federal application. . . . He is chargeable with counsel's actual awareness of the factual and legal bases of the claim at the time of the first petition and with the knowledge that would have been possessed by reasonably competent counsel at the time of the first petition." *Moore*, 824 F.2d at 851. Here, petitioner did not have Evans' statement or Worthy's testimony at the time of his first federal petition; there is therefore no inexcusable neglect unless "reasonably competent counsel" would have discovered the evidence prior to the first federal petition. This court concluded at the evidentiary hearing that petitioner's counsel's failure to discover

Evans' written statement was not inexcusable neglect (I Tr. 118-19). The same is true of counsel's failure to discover Worthy's testimony. Petitioner's counsel represents, and the state has not disputed, that counsel did conduct an investigation of a possible *Massiah* claim prior to the first federal petition, including interviewing "two or three jailers." Petitioner's Post-Hearing Reply Brief at 5. The state has made no showing of any reason that petitioner or his counsel should have known to interview Worthy specifically with regard to the *Massiah* claim. The state argues that petitioner's counsel should have at least interviewed Detectives Harris and Dorsey and Deputy Hamilton. Given that all three denied any knowledge of a request to move Evans next to McCleskey, it is difficult to see how conducting such interviews would have allowed petitioner to assert this claim any earlier. *See Ross v. Kemp*, 785 F.2d 1467, 1478 (11th Cir. 1986) (remanding for evidentiary hearing on inexcusable neglect where petitioner's counsel may have relied on misrepresentations by the custodian of the relevant state records).

In short, the petitioner's *Massiah* claim as it is currently framed is not an abuse of the writ because it is distinct from the *Massiah* claim originally raised in his first state petition and because it is based on new evidence. Petitioner's failure to discover this evidence earlier was not due to inexcusable neglect. Because this claim is not an abuse of the writ it is not a successive petition under section 2244(b) and therefore the court need not inquire whether the petitioner has made a colorable showing of factual innocence, if that showing is now the equivalent of the "ends of justice." *Kuhlmann*, 106 S.Ct. at 2628 n. 18.

3. Conclusions of Law.

The Eleventh Circuit recently summarized the petitioner's burden in cases such as this:

> In order to establish a violation of the Sixth Amendment in a jailhouse informant case, the accused must show (1) that a fellow inmate was a government agent; and (2) that the inmate deliberately elicited incriminating statements from the accused.

Lightbourne v. Dugger, 829 F.2d 1012, 1020 (11th Cir. 1987). The coincidence of similar elements first led the Supreme Court to conclude that such a defendant was denied his sixth amendment right to assistance of counsel in *Massiah v. United States*, 377 U.S. 201 (1964). In that case, the defendant's confederate cooperated with the government in its investigation and allowed his automobile to be "bugged." The confederate subsequently had a conversation in the car with the defendant during which the defendant made incriminating statements. The confederate then testified about the defendant's statements at the defendant's trial. The Supreme Court held that the defendant had been "denied the basic protections of [the sixth amendment] when it was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." *Id.* at 206.[6]

The Supreme Court applied its ruling in *Massiah* to the jailhouse informant situation in *United States v. Henry*, 447 U.S. 264 (1980). In that case, a paid informant for the FBI happened to be an inmate in the same jail in which

defendant Henry was being held pending trial. An investigator instructed the informant inmate to pay particular attention to statements made by the defendant, but admonished the inmate not to solicit information from the defendant regarding the defendant's indictment for bank robbery. The inmate engaged the defendant in conversations regarding the bank robbery and subsequently testified at trial against the defendant based upon these conversations. The Supreme Court held that the inmate had deliberately elicited incriminating statements by engaging the defendant in conversation about the bank robbery. *Id.* at 271. It was held irrelevant under *Massiah* whether the informant questioned the defendant about the crime or merely engaged in general conversation which led to the disclosure of incriminating statements about the crime. *Id.* at 271-72 n. 10. Although the government insisted that it should not be held responsible for the inmate's interrogation of the defendant in light of its specific instructions to the contrary, the Court held that employing a paid informant who converses with an unsuspecting inmate while both are in custody amounts to "intentionally creating a situation likely to induce [the defendant] to make incriminating statements without the assistance of counsel." *Id.* at 274.[7]

Given the facts established earlier, petitioner has clearly established a *Massiah* violation here. It is clear from Evans' written statement that he did much more than merely engage petitioner in conversation about petitioner's crimes. As discussed earlier, Evans repeatedly lied to petitioner in order to gain his trust and to draw him into incriminating statements. Worthy's testimony

establishes that Evans, in eliciting the incriminating statements, was acting as an agent of the state. This case is completely unlike *Kuhlmann v. Wilson*, 106 S.Ct. 2616 (1986), where the Court found no *Massiah* violation because the inmate informant had been a passive listener and had not deliberately elicited incriminating statements from the defendant. Here, Evans was even more active in eliciting incriminating statements than was the informant in *Henry*. The conclusion is inescapable that petitioner's sixth amendment rights, as interpreted in *Massiah*, were violated.

However, "[n]ot every interrogation in violation of the rule set forth in *Massiah* . . . mandates reversal of a conviction." *United States v. Kilrain*, 566 F. 2d 979, 982 (5th Cir. 1978). Instead, "the proper rule [is] one of exclusion of tainted evidence rather than a *per se* standard of reversal if any constitutional violation ha[s] occurred." *Id.* n. 3, citing *Brewer v. Williams*, 430 U.S. 387, 407 n. 12 (1977); *United States v. Hayles*, 471 F.2d 788, 793, *cert. denied*, 411 U.S. 969 (5th Cir. 1973). In other words, "certain violations of the right to counsel may be disregarded as harmless error." *United States v. Morrison*, 449 U.S. 361, 365 (1981), citing *Chapman v. California*, 386 U.S. 18, 23 n. 8 (1967). To avoid reversal of petitioner's conviction the state must "prove beyond a reasonable doubt that the error complained of [the use at petitioner's trial of his own incriminating statements obtained in violation of his sixth amendment rights] did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24. *See also Brown v. Dugger*, No. 85-6082, Slip Op. at 511-12 (11th Cir. November 13, 1987).

Once the fact of the *Massiah* violation in this case is accepted, it is not possible to find that the error was harmless. A review of the evidence presented at the petitioner's trial reveals that Evans' testimony about the petitioner's incriminating statements was critical to the state's case. There were no witnesses to the shooting and the murder weapon was never found. The bulk of the state's case against the petitioner was three pronged: (1) evidence that petitioner carried a particular gun on the day of the robbery that most likely fired the fatal bullets; (2) testimony by co-defendant Ben Wright that petitioner pulled the trigger; and (3) Evans' testimony about petitioner's incriminating statements. As petitioner points out, the evidence on petitioner's possession of the gun in question was conflicting and the testimony of Ben Wright was obviously impeachable.[8] The state also emphasizes that Evans testified only in rebuttal and for the sole purpose of impeaching McCleskey's alibi defense. But the chronological placement of Evans' testimony does not dilute its impact – "merely" impeaching the statement "I didn't do it" with the testimony "He told me he did do it" is the functional equivalent of case in chief evidence of guilt.

For the foregoing reasons, the court concludes that petitioner's sixth amendment rights, as interpreted in *Massiah*, were violated by the use at trial of Evans' testimony about the petitioner's incriminating statements because those statements were deliberately elicited by an agent of the state after petitioner's indictment and in the absence of petitioner's attorney. Because the court cannot say, beyond a reasonable doubt, that the jury would have

convicted petitioner without Evans' testimony about petitioner's incriminating statements, petitioner's conviction for the murder of Officer Schlatt must be reversed pending a new trial.[9]

Unfortunately, one or more of those investigating Officer Schlatt's murder stepped out of line. Determined to avenge his death, the investigator(s) violated clearly-established case law, however artificial or ill-conceived it might have appeared. In so doing, the investigator(s) ignored the rule of law that Officer Schlatt gave his life in protecting and thereby tainted the prosecution of his killer.

B. Mooney Claim.

Petitioner's *Mooney* claim is based upon the state's use at trial of misleading testimony by Offie Evans, which petitioner contends violated his eighth amendment rights and his right to due process of law under the fourteenth amendment. *See Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (criminal conviction may not be obtained using testimony known to be perjured). In particular, petitioner contends that the state failed to correct Evans' misleading testimony regarding his real interest in testifying against petitioner, regarding the circumstances surrounding his cooperation with the state, and regarding petitioner's confession of having shot Officer Schlatt. Petitioner alleges that the newly discovered statement of Offie Evans reveals these misleading elements of Offie Evans' testimony at trial.

Petitioner's allegation that the state misled the jury with Offie Evans' testimony that he was a disinterested witness is actually a restatement of petitioner's *Giglio* claim. The allegation that the state misled the jury with Offie Evans' testimony that he happened to inform the state of petitioner's incriminating statements, when in fact the evidence suggests that Offie Evans may have been an agent of the state, is a restatement of petitioner's *Massiah* claim. Consequently, only the allegations of misleading testimony regarding the actual shooting need to be addressed as allegations supportive of a separate *Mooney* claim.

As a preliminary matter, the failure of petitioner to raise this claim in his first federal habeas petition raises the question of abuse of the writ. Because this claim is based upon the newly discovered statement of Offie Evans, the same conclusion reached as to the *Massiah* claim obtains for this claim. It was not an abuse of the writ to fail to raise the *Massiah* claim earlier and it was not an abuse of the writ to have failed to raise this claim earlier.

However, on its merits the claim itself is unavailing. In order to prevail on this claim, petitioner must establish that the state did indeed use false or misleading evidence and that the evidence was "material" in obtaining petitioner's conviction or sentence or both. *Brown v. Wainwright*, 785 F.2d 1457, 1465 (11th Cir. 1986). The test for materiality is whether there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.* at 1465-66 (quoting *United States v. Bagley*,

___ U.S. ___, 105 S.Ct. 3375, 3382 (1985) (plurality)). Petitioner's allegations of misleading testimony regarding his confession fail for two reasons.

First, no false or misleading testimony was admitted at trial. A comparison of Offie Evans' recently discovered statement and his testimony at trial reveals substantially identical testimony regarding McCleskey's confession that he saw the policeman with a gun and knew there was a choice between getting shot by the policeman or shooting the policeman. *Compare* Pet. Exhibit E, at 6 *with* Trial Tr. at 870. While Offie Evans did use the word "panic" in his written statement when describing this dilemma, the addition of this word adds nothing to the substance of the trial testimony, which conveyed to the jury the exigencies of the moment when petitioner fired upon Officer Schlatt. Second, even if the omission of this one phrase did render the testimony of Offie Evans misleading, this claim would fail because there is no reasonable likelihood that the jury's judgment regarding petitioner's guilt and his sentencing would have been altered by the addition of the phrase "panic" to otherwise substantially identical testimony.

C. Caldwell Claim.

Petitioner's third new claim is based upon references by the prosecutor at petitioner's trial to appellate review of the jury sentencing decision and to the reduction on appeal of prior life sentences imposed on petitioner. These references are said to have violated petitioner's eighth amendment rights and right to due process of law as guaranteed by the fourteenth amendment.

To the extent petitioner claims that the reference to the reduction of prior life sentences was constitutionally impermissible in that it led the jury to impose the death penalty for improper or irrelevant reasons, *see Tucker v. Francis*, 723 F.2d 1504 (11th Cir. 1984), this claim comes too late in the day. Petitioner was aware of these comments at the time he filed his first federal habeas petition but did not articulate this claim at that time. Because the state has pled abuse of the writ, petitioner must establish that the failure to raise this claim during the first federal habeas proceeding was not due to intentional abandonment or inexcusable neglect. Petitioner has offered no excuse for not raising this claim before. He was represented by competent counsel at the time and should not be heard to argue that he was unaware that these facts would support the claim for habeas relief. Indeed, this court recognized the potential for such a claim when passing upon the first federal habeas petition and concluded "it has not been raised by fully competent counsel." *McCleskey v. Kemp*, 580 F. Supp. at 388 n. 27.

Successive petition and abuse of the writ problems also plague this claim to the extent that petitioner is arguing that the prosecutor's reference to the appellate process somehow diminished the jury's sense of responsibility during the sentencing phase. This claim in due process terms was presented to this court by the first federal habeas petition and rejected. *McCleskey v. Zant*, 580 F. Supp. at 387-88 (citing *inter alia Corn v. Zant*, 708 F.2d 549, 557 (11th Cir. 1983)). Petitioner has offered no reason that the ends of justice would be served by revisiting this due process claim.

Petitioner also argues that reference to the appellate process violated his eighth amendment rights. Although petitioner did not articulate this eighth amendment claim at the time of the first federal habeas proceeding, the failure to raise the claim at that time does not amount to an abuse of the writ. Only after this court ruled upon the first federal habeas petition did the Supreme Court indicate that it is a violation of the eighth amendment "to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985). This circuit has recently held that failure to raise a *Caldwell* claim in a first federal habeas petition filed before the decision does not amount to abuse of the writ because there has been a change in the substantive law. *Adams v. Dugger*, 816 F.2d 1493, 1495-96 (11th Cir. 1987) (per curiam).

Although this court must reach the merits of the *Caldwell* claim, the claim itself fails for the same reasons that the due process proof of this claim failed. The essential question is whether the comments likely caused the jury to attach diminished consequences to their deliberations on the death penalty. *See McCleskey v. Zant*, 580 F. Supp. at 388. A review of the prosecutor's actual comments at petitioner's trial does not reveal any impermissible suggestions regarding the appellate process which would have led the jury to believe that the responsibility for imposing the death penalty rested elsewhere. As this court observed when passing upon the due process claim raised by the first petition,

> The prosecutor's arguments in this case did not intimate to the jury that a death sentence could be reviewed or set aside on appeal. Rather, the prosecutor's argument referred to petitioner's prior criminal records and the sentences he had received. The court cannot find that such arguments had the effect of diminishing the jury's sense of responsibility for its deliberations on petitioner's sentence. Insofar as petitioner claims that the prosecutor's arguments were impermissible because they had such an effect, the claim is without merit.

McCleskey v. Zant, 580 F. Supp. at 388.

D. Batson Claim.

Petitioner's final claim rests upon the alleged systematic exclusion of black jurors by the prosecutor at petitioner's trial. This exclusion is said to have violated petitioner's right to a representative jury as guaranteed by the sixth and fourteenth amendments.

This claim was not raised during the first federal habeas proceedings. However, failure to raise this claim could not be said to constitute abuse of the writ because prior to the Supreme Court's decision in *Batson v. Kentucky*, ___ U.S. ___, 107 S.Ct. 708 (1987), petitioner could not have made out a prima facie claim absent proof of a pattern of using preemptory strikes to exclude black jurors in trials other than petitioner's. *See id.* at 710-11. (citing *Swain v. Alabama*, 380 U.S. 202 (1965)).

Although petitioner did not abuse the writ by failing to raise this claim earlier, the claim itself lacks merit. The holding in *Batson*, which allows defendants to make the

prima facie showing of an unrepresentative jury by proving a systematic exclusion of blacks from their own jury, has not been given retroactive application. The *Batson* decision does not apply retroactively to collateral attacks "where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed" before the *Batson* decision. *Allen v. Hardy*, ___ U.S. ___, 106 S.Ct. 2878, 2880 n. 1 (1986) (per curiam). Although the *Allen* decision did not involve a habeas petitioner subject to the death penalty, this circuit has specifically held that *Batson* may not be applied retroactively even to a habeas petitioner subject to the death penalty. *See Lindsey v. Smith*, 820 F.2d 1137, 1145 (11th Cir. 1987); *High v. Kemp*, 819 F.2d 988, 992 (11th Cir. 1987).

VI. OTHER MOTIONS.

Also pending before this court are petitioner's motions for discovery and for leave to exceed this court's page limits. The court presumes that the above resolution of the petitioner's various claims and the evidentiary hearing held in this case obviate the need for any further discovery. Petitioner's motion for discovery, filed before the evidentiary hearing, does not provide any reason to think otherwise. The motion for discovery is therefore DENIED. The motion to exceed page limits is GRANTED.

VII. CONCLUSION.

In summary, the petition for a writ of habeas corpus is DENIED as to petitioner's *Giglio*, intentional discrimination, and *Ake* claims because those claims are

successive and do not fall within the ends of justice exception. The petition for a writ of habeas corpus is DENIED as to petitioner's *Mooney, Caldwell* and *Batson* claims because they are without merit. Petitioner's motion for discovery is DENIED and his motion to exceed page limits is GRANTED. The petition for a writ of habeas corpus is GRANTED as to petitioner's *Massiah* claim unless the state shall re-try him within 120 days of the receipt of this order.

SO ORDERED, this 23rd day of December, 1987.

/s/ J. Owen Forrester
J. OWEN FORRESTER
UNITED STATES DISTRICT JUDGE

(ENTERED DEC 24 1987)

FOOTNOTES

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[1] Petitioner was also convicted on two counts of armed robbery and sentenced to two consecutive life sentences.

[2] Another distinct ground for finding excusable neglect is a showing that the petitioner did not realize that the facts of which he had knowledge could constitute a basis for which federal habeas corpus relief could be granted. *Booker v. Wainwright*, 764 F.2d 1371, 1376 (11th Cir. 1985). Although "[t]he exact scope of this alternative exception to the abuse of writ doctrine lacks adequate definition," *id.*, it would appear from the cases that it applies only when the petitioner appeared *pro se* in presenting the first habeas petition. *See, e.g., Haley v. Estelle*, 632 F.2d 1273, 1276 (5th Cir. 1980).

[3] " '. . . [W]e hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital-sentencing process." *Powell, J., for the majority). McCleskey v. Kemp*, ___ U.S. ___, 107 S.Ct. 1759 at 1778 (1987).

[4] *See* the discussion of McCleskey's *Massiah* claim *infra*.

[5] References to the transcripts of the July 8, July 9, and August 10, 1987 hearings will be to "I TR.," "II Tr.," and "III Tr.," respectively.

[6] Dissenting Justice White, joined by Clark and Harland, JJ., protested the new "constitutional rule . . . barring the use of evidence which is relevant, reliable and highly probative of the issue which the trial court has before it." 377 U.S. at 208. The dissenters were "unable to see how this case presents an unconstitutional interference with Massiah's right to counsel. Massiah was not prevented from consulting with counsel as often as he wished. No meetings with counsel were disturbed or spied upon. Preparation for trial was in no way obstructed. It is only a sterile syllogism – an unsound one, besides – to say that because Massiah had a right to counsel's aid before and during the trial, his out-of-court conversations and admissions must be excluded if obtained without counsel's consent or presence." *Id*. at 209.

The dissenters highlighted the incongruity of overturning Massiah's conviction of these facts. "Had there been no prior arrangements between [the confederate] and the police, had [the confederate] simply gone to the police after the conversation had occurred, his testimony relating Massiah's statements would be readily admissible at the trial, as would a recording which he might have made of the conversation. In such event, it would simply be said that Massiah risked talking to a friend who decided to disclose what he knew of Massiah's criminal activities. But if, as occurred here, [the confederate] had been cooperating with the police prior to his meeting with Massiah, both his evidence and the recorded conversation are somehow transformed into inadmissible evidence despite the fact that the hazard to Massiah remains precisely the same – the defection of a confederate in crime." *Id*. at 211.

[7] Justice Rehnquist, dissenting, questioned the validity of *Massiah*: "The exclusion of respondent's statements has no relationship whatsoever to the reliability of the evidence, and it rests on a prophylactic application of the Sixth Amendment right to counsel that in my view entirely ignores the doctrinal foundation of that right." 447 U.S. at 289. Echoing many of the concerns expressed by Justice White in *Massiah, id*. at 290, Justice Rehnquist argued that "there is no constitutional or historical support for concluding that an accused has a right to have his attorney serve as a sort of guru who must be present whenever an accused has an inclination to reveal incriminating information to anyone who acts to elicit such information at the behest of the prosecution." *Id*. at 295-96. Admitting that the informants in *Henry* and in *Massiah* were encouraged to elicit information from the respective defendants, Justice Rehnquist "doubt[ed] that most people would find this type of elicitation reprehensible." *Id*. at 297.

For criticism of *Henry* for extending *Massiah* "despite that decision's doctrinal emptiness" and for giving *Massiah* "a firmer place in the law than it deserves," see Salzburg, *Forward: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 Geo.L.J. 151, 206-08 (1980).

[8] There is some question whether Ben Wright's testimony on the fact of the murder would have been admissible at all absent corroboration by Evans' testimony. *See* O.C.G.A. §24-4-8 (uncorroborated testimony of an accomplice not sufficient to establish a fact). *But see McCleskey v. Kemp*, 753 F.2d at 885 (Wright's testimony corroborated by McCleskey's admitted participation in the robbery; corroboration need not extend to every material detail).

[9] Here, as in *Massiah* and Henry, the evidence is excluded and the conviction consequently reversed despite the fact that the evidence is "relevant, reliable and highly probative" of petitioner's guilt. *Massiah*, 377 U.S. at 208 (White, J., dissenting). There is no question that petitioner's incriminating statements to Evans were made voluntarily and without coercion. Had Evans been merely a good listener who first obtained McCleskey's confession and then approached the authorities, Evans' testimony would have been admissible. The substance

of the evidence would have been no different, McCleskey's risk in speaking would have been no different, and McCleskey's counsel would have been no less absent, but the evidence would have been admissible simply because the state did not intentionally seek to obtain it. While this court has grave doubts about the historical and rational validity of the Supreme Court's present interpretation of the sixth amendment, those doubts have been articulated ably in the dissents of Justice White and Justice Rehnquist. *See supra*, notes 4 and 5. Until the Supreme Court repudiates its present doctrine this court will be obliged to reach the result it reaches today.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

(Caption Omitted In Printing)

JUDGMENT

The Court, Honorable J. OWEN FORRESTER, United States District Judge, by order of this date, having GRANTING the petition for a writ of habeas corups, (sic) DIRECTING, the petitioner to re-try defendant within 120 days from receipt of the 12/23/87 order.

JUDGMENT is hereby entered in favor of the petitioner and against the respondent.

Dated at Atlanta, Georgia, this 15 day of January, 1988.

with permission of the court Nunc pro tunc for December 23, 1987.

LUTHER D. THOMAS, Clerk

By: illegible
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

(Caption Omitted In Printing)

ORDER

This matter is before the court on respondent's motion to reopen judgment. Fed. R. Civ. P. 60(b).

I. FACTS.

This petition for writ of habeas corpus was filed July 7, 1987. With the petition was a motion for stay of execution. This court granted the stay of execution verbally July 9, 1987, and in a formal order July 10, 1987. A two-day hearing was held on the petition for writ of habeas corpus July 8 and 9, 1987. The court continued the evidentiary hearing until August 10, 1987. On December 23, 1987 the court granted in part and denied in part the petition for writ of habeas corpus, and judgment was entered the same day. Respondent appealed, and petitioner cross-appealed. The judgment was stayed by the court March 9, 1988. The pending motion for relief from final judgment based on newly discovered evidence was filed May 6, 1988. The court entered an order allowing discovery until August 1, 1988 on the two issues of due diligence and of the previously unavailable witness, Offie Evans' knowledge.

Respondent seeks to reopen the December 1987 judgment based on the present availability of Offie Evans. Evans was a witness at petitioner's trial. The evidentiary hearings on the petition for writ of habeas corpus revealed that Evans had been moved purposely to a cell

adjacent to McCleskey's in order to elicit information from him. The court found that this was a violation of the *Massiah* doctrine. *See* Order, December 23, 1987. Evans did not testify at the evidentiary hearings on the habeas corpus petition.

Petitioner attempted to locate Mr. Evans during the July hearings in order for him to testify. An attorney working with petitioner's counsel made repeated phone calls to Offie Evans' sister looking for Mr. Evans. He was not able to reach Mr. Evans, but did get the address of another sister who he was supposedly staying with at the time. The attorney made repeated visits to the sister's house in order to try and find Mr. Evans. The attorney was told that Mr. Evans came by the residence every now and then but was not staying there. Stevenson Affidavit. Petitioner also hired an investigator, T. Delaney Bell, to help locate Mr. Evans. The investigator visited several addresses of both Mr. Evans and relatives, over a four-day period in June 1987. The investigator contacted family members again on July 6, 1987 and was told that they did not know where he was staying. Bell Aff. During the July 8th hearing the court noted that the federal marshal had tried to serve Mr. Evans at a sister's house but the sister did not know where he was. Respondent made no efforts to contact or locate Mr. Evans.

The respondent sent two letters to petitioner in the period between the July and August hearings to notify petitioner's counsel of the witnesses he would call in the August hearing. Both of those letters referred to the respondent's intent to re-call witnesses who had previously testified in the July hearings, but neither mentioned any desire or intention to call Mr. Evans as a witness. In

April 1988, counsel for respondent learned that Mr. Evans was in the Fulton County Jail on other charges. Respondent now seeks to set aside the judgment in order to take the testimony of Offie Evans.

II. CONCLUSIONS OF LAW.

Petitioner has moved this court to expand the record to include: discovery conducted pursuant to the court's order of June 17, 1988; Affidavits of Stevenson, Bell and Hashimi; Docket Sheet, *United States v. Offie Gene Evans*, No. 28027; Sentence, *Fulton Superior State Court v. Offie Evans*, No. A-16523 (May 15, 1973); and a newspaper clipping, *Atlanta Constitution*, December 24, 1987. Petitioner's two motions are unopposed, and for good cause shown petitioner's motion to expand the record, and second motion to expand the record are GRANTED.

Rule 60(b)[1] defines the circumstances under which a party may obtain relief from a final judgment. It should be construed in order to do substantial justice, but this does not mean that final judgment should be lightly reopened. The desirability for order and predictability in

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[1] Respondent's motion is based on Rule 60(b)(2) and (6). The rule says,

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons; . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); . . . (6) any other reason justifying relief from the operation of the judgment.

the judicial process speaks for caution in the reopening of judgments. *Griffin v. Swim-Tech Corp.*, 722 F.2d 677 (11th Cir. 1984). The provisions of this rule must be carefully interpreted to preserve the delicate balance between the sanctity of final judgments and the "incessant command of the court's conscience that justice be done in light of *all* the facts." *Id.*, citing *Bankers Mortgage Company v. United States*, 423 F.2d 73, 77 (5th Cir.), *cert. denied*, 399 U.S. 927 (1970) (emphasis in original). Rule 60(b) motions are directed to the sound discretion of the district court. Because a motion for new trial under Rule 60(b) is an extraordinary motion, the requirements of the rule must be strictly met. *Seutieri v. Paige*, 808 F.2d 785 (11th Cir. 1987).

A. Rule 60(b)(2).

In order to succeed under 60(b)(2), a party must satisfy a five-part test: 1) the evidence must newly discovered since the trial; 2) due diligence on the part of the movant to discover the new evidence must be shown; 3) the evidence must not be merely cumulative or impeaching; 4) the evidence must be material; and 5) the evidence must be such that a new trial would probably produce a new result. *Seutieri*, 808 F.2d at 793; *see also, Taylor v. Texgas Corp.*, 831 F.2d 255 (11th Cir. 1987).

1. New discovered.

Offie Evans' identity has been known to the state since the initial trial. The respondent contends this is newly discovered evidence because Evans has not been able to testify about the question which became crucial in

this petition for habeas corpus; that is, the relationship between himself and the police, and whether he was directed by the authorities to elicit incriminating statements from McCleskey. Evans has given evidence at least three times in this case, in the original trial, the state habeas proceeding, and in his statement given in August 1978. Moreover, petitioner points out that in October 1981, Mr. Evans gave a deposition in the case of McCleskey's co-defendant, Bernard Depree. That deposition was filed in a federal habeas petition on behalf of Depree, in which the state was represented by respondent's present counsel. Petitioner contends that this deposition includes testimony about his contacts with the Atlanta Police while in the Fulton County Jail in 1978, and denials that he made police contacts until after he had spoken with Mr. McCleskey. Petitioner points out that the testimony in that deposition is contradictory to the testimony given in the deposition taken pursuant to this motion, but that the essentials are the same.

In light of the above discussion, it is apparent that Evans' testimony is not truly newly discovered but rather is merely newly produced. *See, Johnson Waste Materials v. Marshal,* 611 F.2d 593 (5th Cir. 1980) (checks and records which had been misplaced at time of trial were not newly discovered evidence sufficient to support 60(b)(2) motion). The fact that the essential substance of this testimony was in a previous deposition filed in the public records and known to respondent's counsel also indicates it is not newly discovered. *Seutieri,* 808 F.2d at 794 (evidence contained in public records at time of trial cannot be considered newly discovered evidence); *Taylor,* 831 F.2d at 255 (evidence cannot be newly discovered if in

possession of moving party or his attorney prior to entry of judgment). Where the movant was aware of a witness's identity and knowledge of the transaction, and chose not to track him down because of the expense, the evidence is not newly discovered because he was aware of the existence of the evidence before the trial. *Parrilla-Lopez v. United States,* 841 F.2d 16 (1st Cir. 1988). Similarly, in this case, the government was aware of the witness's existence, identity and relationship to the transaction but did not attempt to have him testify at trial. It is evident that Offie Evans' testimony is not truly newly discovered under the relevant authority.

2. Due Diligence.

In the June 17, 1988 order, the court noted that Respondent's "due diligence is measured by what the respondent knew at the time. That would include what the respondent knew about petitioner's effort to locate Offie Evans. That is not necessarily the sum total of his knowledge nor do the petitioner's efforts to locate Evans relieve him of any obligation to utilize resources available to him."

Respondent contends that though he did not make any efforts to track down Offie Evans during the summer of 1987, it was apparent from the activities of the petitioner that such actions would be futile.[2] Petitioner points

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[2] It appears that respondent's knowledge of petitioner's efforts to locate Evans came only from petitioner's counsel's statements at the evidentiary hearings.

out that the Atlanta Bureau of Police Services has enjoyed a special relationship with Mr. Evans over the years, and that if the department had been looking for him, Mr. Evans might have made himself available or with those larger resources could have been found. Petitioner especially points to the testimony of Assistant District Attorney Russ Parker that he had no information or leads as to Evans' location, but that he "could probably find him. [I have] spend enough time with him." I Tr. 174.

Discovery pursuant to this motion reveals that respondent made no efforts to locate Evans during the summer of 1987. *See*, Respondent's Answer to First Interrogatories of Petitioner, No. 1. Respondent now contends that the deposition of Evans shows that he was outside of Atlanta, and respondent would not have been able to locate him anyway. However, the affidavits of petitioner's assistants show that Evans' relatives had seen him at various times during petitioner's search for him. Therefore, it is unclear where exactly Mr. Evans was at the time and whether or not he could have been found. Moreover, it is not good enough merely to say that it would be impossible to find the evidence. Due diligence is measured by respondent's knowledge and actions. The standard under 60(b)(2) is that the movant exercise due diligence in order to find the relevant evidence before entry of judgment. Respondent relied on petitioner's actions in seeking Mr. Evans, but made no efforts of his own. As the court previously noted, petitioner's efforts did not relieve respondent of any obligation to utilize his own resources to locate Evans. Movant has not demonstrated the due diligence prong of the 60(b)(2) standard.

3. Evidence is Not Cumulative or Impeaching; Materiality.

Evans' deposition testimony essentially asserts that he was not moved intentionally to be placed next to McCleskey, and in fact was not moved at all, and was not an informant. His testimony goes directly to the issue involved, and therefore is material. However, there are numerous internal contradictions within the deposition, and contradictions with Evans' previous statements, or the statements of other witnesses. Also, it is clear that Mr. Evans has his own motives for denying his status as an informant. He expressed concern several times during his deposition about newspaper accounts which had labeled him an informant, because that kind of information could get a man killed. Evans Depo., p. 25.

4. Likelihood of Producing a Different Result.

It is unlikely Evans' testimony would produce a different result. The credibility or believability problems with his testimony are evident. He has a strong motivation for saying he was not an informant, not only because of recriminations from his associates, but also in order to stay in favor with the police and prosecutors who have used him to testify in the past. The numerous contradictions within his deposition also lead the court to the conclusion that his testimony would not be believable. *See* Petitioner's Brief in Response to Respondent's Supplement to Rule 60(b) Motion. In finding a *Massiah* violation, the court relied on the testimony of Officer Ulysses Worthy that someone requested his permission to move Evans to be near McCleskey, Order, December 23, 1987, p.

18, even in the face of other law enforcement personnel who denied requesting that Evans be moved or having any knowledge of such a request. Order, p. 19. The court relied on Worthy's testimony and noted that "[t]he lack of corroboration by other witnesses is not surprising; the other witnesses, like Assistant District Attorney Parker, had no reason to know of a request to move Evans or, like Detective Dorsey, had an obvious interest in concealing any such arrangement. Worthy, by contrast, had no apparent interest or bias that would explain any conscious deception." Order, p. 22. Therefore, Evans' testimony is not likely to change the credibility of Worthy's testimony or the fact that petitioner showed by a preponderance of the evidence that a *Massiah* violation occurred.

Therefore, for the above reasons, respondent's motion under 60(b)(2) is DENIED.

B. Rule 60(b)(6).

Rule 60(b)(6) grants federal courts broad authority to relieve a party from a final judgment "upon such terms as are just" provided the motion is made within a reasonable time and is not premised on one of the grounds in (b)(1) through (b)(5). *Liljeberg v. Health Services Acquisition Corp.*, ___ U.S. ___, 56 U.S.L.W. 4637, 4642 (1988). This ground should be applied only in exceptional circumstances. *Id*. The party seeking relief under 60(b)(6) has the burden of showing that absent such relief, an extreme and unexpected hardship will result. *Griffin*, 722 F.2d at 680. Respondent contends that in the unusual circumstances of this case, it would serve the ends of justice to reopen judgment under 60(b)(6). However, respondent

has shown no exceptional circumstances outside those discussed in the Rule 60(b)(2) motion. There is little likelihood that if this motion is denied an extreme hardship will result to respondent. Therefore, respondent's motion under Rule 60(b)(6) is DENIED.

III. CONCLUSION.

In sum, petitioner's two motions to expand record are GRANTED. Respondent's motion for relief from final judgment is DENIED.

SO ORDERED this 6th day of January, 1989.

/s/ J. Owen Forrester
J. OWEN FORRESTER
UNITED STATES DISTRICT JUDGE

United States Court of Appeals,
Eleventh Circuit.

Warren McCLESKEY,
Petitioner-Appellee,

v.

Walter ZANT, Superintendent, Georgia Diagnostic and Classification Center,
Respondent-Appellant.

Nos. 88-8085, 89-8085.

Nov. 22, 1989.

As Amended Dec. 13, 1989.

Appeals from the United States District Court for the Northern District of Georgia.

Before KRAVITCH and EDMONDSON, Circuit Judges, and RONEY, Senior Circuit Judge.

KRAVITCH, Circuit Judge:

This is a consolidated appeal by the State of Georgia from the district court's grant of Warren McCleskey's second petition for a writ of habeas corpus and from the district court's denial of the State's motion under Fed.R.Civ.P. 60(b) for relief from the judgment. The district court granted the writ solely on the basis of McCleskey's claim that his sixth amendment rights had been violated under *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). Because we find that the district court abused its discretion in failing to dismiss McCleskey's *Massiah* allegation as an abuse of the writ, we reverse the district court without reaching the merits of McCleskey's *Massiah* claim or of the State's Rule 60(b) motion.

I. FACTS[1]

McCleskey was arrested and charged with the murder of a police officer during an armed robbery of the Dixie Furniture Store. The store was robbed by four men. Three entered through the back door and one through the front. Each of the four men was armed. McCleskey had a .38 caliber Rossi white-handled, nickel-plated pistol, Ben Wright had a sawed-off shotgun, and the other two had blue steel pistols. The man who entered through the front secured the store, forcing the employees to lie on the floor. The others rounded up the employees in the rear and began to tie them up with tape. The manager was forced at gunpoint to turn over the store receipts, his watch, and six dollars. Responding to a silent alarm, a police officer entered the store by the front door. He proceeded approximately fifteen feet down the center aisle. Two shots were fired. One shot struck the police officer in the head causing his death. The other shot glanced off a pocket lighter in the officer's pocket and lodged in a sofa. That bullet was recovered. The robbers fled. Sometime later, McCleskey was arrested in connection with another armed robbery.

McCleskey was identified by two of the store personnel as the robber who came in the front door. Shortly after his arrest, McCleskey confessed to participating in the robbery, but maintained that he was not the triggerman. One of his accomplices, Ben Wright, testified that McCleskey admitted to shooting the officer. Offie Evans,

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[1] The statement of facts is taken from the Georgia Supreme Court's opinion on direct appeal, *McCleskey v. The State*, 245 Ga. 108, 263 S.E.2d 146 (1980).

a jail inmate housed near McCleskey testified that McCleskey made a "jail house confession" in which he claimed he was the triggerman. The police officer was killed by a bullet fired from a .38 caliber Rossi handgun. Though the weapon was not recovered, McCleskey had stolen a .38 caliber Rossi in a holdup of a Red Dot grocery store two months earlier.

II. PRIOR PROCEEDINGS

The jury convicted McCleskey of murder and two counts of armed robbery. It sentenced McCleskey to death for the murder of the police officer and to consecutive life sentences for the two robbery counts. In 1980, these convictions and sentences were affirmed by the Georgia Supreme Court, *McCleskey v. State*, 245 Ga. 108, 263 S.E.2d 146, *cert. denied*, 449 U.S. 891, 101 S.Ct. 253, 66 L.Ed.2d 119 (1980). In January of 1981, McCleskey petitioned for habeas corpus relief in the Superior Court of Butts County, asserting over twenty challenges to his conviction and sentence. In an amendment to his petition, McCleskey alleged a *Massiah* violation, claiming that the introduction into evidence of statements he made to an informer violated his rights under the sixth amendment. *See Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199. The petition was denied after an evidentiary hearing and the Georgia Supreme Court denied McCleskey's application for a certificate of probable cause to appeal. The United States Supreme Court denied McCleskey's petition for certiorari. *McCleskey v. Zant*, 454 U.S. 1093, 102 S.Ct. 659, 70 L.Ed.2d 631 (1981).

McCleskey filed his first federal habeas petition in district court in December of 1981, asserting eighteen grounds for granting the writ. That petition did *not* include a claim under *Massiah*. It did, however, include a claim under *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), alleging that the state prosecutor had failed to reveal that Offie Evans, one of its witnesses, had been promised favorable treatment as a reward for his testimony. In 1984, the district court granted habeas corpus relief as to McCleskey's *Giglio* claim. It ordered that his conviction and sentence for malice murder be set aside, but affirmed his convictions and sentences for armed robbery. *McCleskey v. Zant*, 580 F.Supp. 338 (N.D.Ga. 1984).

Both parties appealed and in 1985, the Eleventh Circuit, sitting *en banc*, reversed the district court's grant of the writ on the *Giglio* claim and affirmed on all claims denied by the district court. *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir.1985) (en banc). McCleskey then filed a petition for a writ of certiorari in the Supreme Court of the United States. The Supreme Court granted certiorari limited to consideration of the application of the Georgia death penalty and affirmed the Eleventh Circuit. *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262, *petition for rehearing denied*, 482 U.S. 920, 107 S.Ct. 3199, 96 L.Ed.2d 686 (1987).

McCleskey filed a subsequent petition for a writ of habeas corpus in state court in June of 1987. In an amendment to that petition, McCleskey once again raised a *Massiah* claim, alleging that newly discovered evidence demonstrated that a jail inmate of McCleskey's was acting on behalf of the State as an informant. The state court

granted the State's motion to dismiss and the Georgia Supreme Court denied McCleskey's application for a certificate of probable cause.

McCleskey filed the present petition for a writ of habeas corpus in federal district court in July of 1987. After evidentiary hearings on the petition in July and August of 1987, the district court entered an order granting habeas corpus relief only as to McCleskey's murder conviction and sentence based upon the finding of a *Massiah* violation. *McCleskey v. Kemp*, No. C87-1517A (N.D.Ga. Dec. 23, 1987).

The State now appeals the district court's grant of the writ, claiming that the district court abused its discretion in failing to dismiss McCleskey's *Massiah* allegation as an abuse of the writ and that the district court erred in finding a violation of *Massiah*.[2]

III. ABUSE OF THE WRIT

A. *Background*

Under the doctrine of "abuse of the writ," a federal court may decline to entertain a second or subsequent habeas corpus petition that raises a claim that the petitioner did not raise in a prior petition. The doctrine is

[2] This court stayed the briefing schedule of the appeal pending the State's filing in district court of a motion under Fed.R.Civ.P. 60(b) for relief from the judgment based on the availability of witness Offie Evans. The district court denied the motion and this court granted the State's motion to consolidate the State's original appeal and its appeal from the denial of the motion for relief from the judgment.

grounded in the court's equitable power to decline to entertain a habeas corpus petition properly within its jurisdiction when "a suitor's conduct in relation to the matter at hand . . . disentitle[s] him to the relief he seeks." *Sanders v. United States*, 373 U.S. 1, 17, 83 S.Ct. 1068, 1078, 10 L.Ed.2d 148 (1963) (quoting *Fay v. Noia*, 372 U.S. 391, 438, 83 S.Ct. 822, 849, 9 L.Ed.2d 837 (1963)).

The statutory basis for the doctrine of abuse of the writ in cases of successive petitions for habeas corpus can be found at 28 U.S.C. § 2244(b)[3] and Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts.[4] These provisions address the problem of

[3] 28 U.S.C. § 2244(b) states as follows:

> When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

[4] Rule 9(b) provides as follows:

> **Successive Petitions.** A second or successive petition may be dismissed if the judge finds that it fails

(Continued on following page)

prisoners filing the same claims in successive petitions as well as the problem of prisoners who abuse the writ by filing their claims piecemeal. A "successive petition" is one that raises a claim already adjudicated through a prior petition, while a petition that raises grounds for relief not raised in the prior petition is analyzed as an "abuse of the writ." *See Gunn v. Newsome*, 881 F.2d 949, 955 n. 6 (11th Cir.1989) (en banc) (plurality opinion), *petition for cert. filed*, No. 89-611, 1989 WL 129621 (Oct. 16, 1989).

A federal court's decision to exercise its equitable power to dismiss a petition is based on different considerations in the two types of cases. In cases of successive petitions, equity usually will not permit a petitioner to reassert a claim resolved against him "in the hope of getting before a different judge in multijudge courts." *See* Sec. 2254 Cases R. 9 advisory committee's note. In cases of abuse of the writ, equity counsels against allowing "needless piecemeal litigation" or "collateral proceedings whose only purpose is to vex, harass, or delay." *Sanders*, 373 U.S. at 18, 83 S.Ct. at 1078. In both instances, the need for finality in criminal law counsels strongly against courts repeatedly reviewing criminal convictions. *See Kuhlmann v. Wilson*, 477 U.S. 436, 452-53, 106 S.Ct. 2616, 2626-27, 91 L.Ed.2d 364 (1986) (plurality opinion).

(Continued from previous page)

to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

The state has the burden of pleading that the habeas petitioner has abused the writ. *Price v. Johnston*, 334 U.S. 266, 291-92, 68 S.Ct. 1049, 1063, 92 L.Ed. 1356 (1948). This circuit has held that "[t]he state carries its burden by recounting the petitioner's writ history, identifying the claims not raised before the instant petition and alleging that the petitioner abused the writ in violation of 28 U.S.C. § 2254, Rule 9(b)." *Booker v. Wainwright*, 764 F.2d 1371, 1376 (11th Cir.1985), *cert. denied*, 474 U.S. 975, 106 S.Ct. 339, 88 L.Ed.2d 324 (1985). The State has clearly met its burden here, as it is evident that McCleskey did not assert his *Massiah* claim in his first federal habeas petition.

McCleskey's previous failure to assert the claim does not, however, require the federal court to dismiss his petition, for the courts have recognized that "not all piecemeal litigation is needless." *Booker v. Wainwright, id.; see also Haley v. Estelle*, 632 F.2d 1273, 1276 (5th Cir.1980).[5] Once the state has alleged abuse of the writ, the petitioner must be afforded the opportunity to justify his previous failure to raise the claim. In deciding whether a petitioner has presented sufficient justification, courts have required the petitioner to show that he did not deliberately abandon the claim and that his failure to raise it was not due to inexcusable neglect. *See Woodward v. Hutchins*, 464 U.S. 377, 379, 104 S.Ct. 752, 753, 78 L.Ed.2d 541 (1984) (per curiam) (Powell, J., concurring,

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[5] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981.

joined by four other justices); *Demps v. Dugger*, 874 F.2d 1385, 1391 (11th Cir.1989), *petition for cert. filed*, No. 89-5277, 1989 WL 113448 (Aug. 4, 1989); *Witt v. Wainwright*, 755 F.2d 1396, 1397 (11th Cir.), *cert. denied*, 470 U.S. 1039, 105 S.Ct. 1415, 84 L.Ed.2d 801 (1985); *Potts v. Zant*, 638 F.2d 727,740-41 (5th Cir. Unit B 1981), *cert. denied*, 454 U.S. 877, 102 S.Ct. 357, 70 L.Ed.2d 187 (1981).[6] If a court determines that the petitioner has filed to carry his burden of disproving an abuse of the writ, it may dismiss the petition unless the ends of justice demand that the court reach the merits. *Sanders*, 373 U.S. at 16-19, 83 S.Ct. at 1078-79; *Demps v. Dugger*, 874 F.2d at 1391; *Davis v. Kemp*, 829 F.2d 1522, 1526 (11th Cir.1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1099, 99 L.Ed.2d 262 (1988).

Whether a second or subsequent petition is to be dismissed on abuse of the writ grounds is left to the sound discretion of the district court. *Sanders*, 373 U.S at 18, 83 S.Ct. at 1079; *Darden v. Dugger*, 825 F.2d 287, 294 (11th Cir.1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1125, 99 L.Ed.2d 285 (1988); *Potts v. Zant*, 638 F.2d at 741. Yet discretion in such matters is not unfettered, and its sound exercise will rarely permit a district court to hear a petition that clearly constitutes an abuse of the writ. *See Gunn v. Newsome*, 881 F.2d at 949.

In the instant appeal, the district court found that McCleskey could not be said to have intentionally abandoned his claim. We disagree and find that the district

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[6] In *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir.1982), this court adopted as binding precedent all decisions of Unit B of the former Fifth Circuit handed down after September 30, 1981.

court abused its discretion in failing to dismiss a clearly abusive petition.

B. *Deliberate Abandonment of the Massiah Claim*

McCleskey asserts that his failure to raise a *Massiah* claim in his earlier federal petition is justified because at the time he filed that petition, he lacked the evidence to support such a claim. To demonstrate a violation of sixth amendment rights under *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, a defendant must show that the prosecution deliberately elicited incriminating statements from him in the absence of his lawyer. *Massiah* itself involved statements made by a defendant free on bail to a co-indictee in a car that had been wired by the government. In *United States v. Henry*, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980), the Supreme Court applied *Massiah* to a situation in which incriminatory statements were made to a cellmate who was a government informant. In *Kuhlmann v. Wilson*, the Supreme Court stressed that a defendant alleging a *Massiah* violation "must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." 477 U.S. at 459, 106 S.Ct. at 2630.[7]

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[7] In *Lightbourne v. Dugger*, 829 F.2d 1012 (11th Cir.1987), *cert. denied*, ___ U.S. ___, 109 S.Ct. 329, 102 L.Ed.2d 346 (1988), this circuit characterized petitioner's burden in a *Massiah/Henry* claim as one involving two elements: "In order to establish a violation of the Sixth Amendment in a jailhouse informant case, the accused must show (1) that a fellow inmate was a government agent; and (2) that the inmate deliberately elicited incriminating statements from the accused." *Id.* at 1020.

McCleskey bases his *Massiah* claim on two pieces of evidence. The first is a 21-page written statement of Offie Evans, a prisoner who was incarcerated in the cell next to McCleskey's when McCleskey was in the Fulton County Jail awaiting trial. Evans testified against McCleskey at trial, relating several incriminating statements made by McCleskey. The written statement, which had been given to the Atlanta Police Department in August of 1978, sets out these conversations in great detail, demonstrating that Evans lied to McCleskey in order to get information from him.[8] McCleskey argues that the written statement shows evidence of an *ab initio* relationship between Evans and the prosecution and is thus highly relevant to his *Massiah* claim.

The second piece of evidence McCleskey uses to support his *Massiah* claim is the testimony of Ulysses Worthy who was captain of the day watch at the Fulton County Jail during the summer of 1978. Worthy testified at two separate points during the district court hearings on McCleskey's second habeas petition. Though Worthy's testimony was at times confused and contradictory, the district court credited Worthy's assertion that at some point some officer involved with the case had asked that Evans be moved to a different cell. The district court judge relied heavily on Worthy's testimony in holding that McCleskey had presented a valid *Massiah* claim. In fact, he found that "[t]he lack of corroboration by other

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[8] For instance, Evans told McCleskey that his name was Charles, that he was the uncle of codefendant Ben Wright, and that he was supposed to be a participant in the robbery himself.

witnesses is not surprising; the other witnesses, like Assistant District Attorney Parker, had no reason to know of a request to move Evans or, like Detective Dorsey, had an obvious interest in concealing any such arrangement. Worthy, by contrast, had no apparent interest or bias that would explain any conscious deception." *McCleskey*, No. C87-1517A, slip op. at 22.

McCleskey maintains that he was unaware of both pieces of evidence critical to his *Massiah* claim until well after he filed his first federal habeas petition. It is uncontested that he did not obtain Evans' statement until July of 1987 and that he did not know about the existence of Worthy until the time of the hearing on the second federal habeas petition. The State strongly contends that habeas counsel realized or should have realized that Evans had made a written statement concerning his conversations with McCleskey and asserts that petitioner's counsel should have made some effort to obtain that statement. The district court found, however, that McCleskey was not in fact aware of the written statement, and we cannot say that this determination is clearly erroneous.

Assuming that McCleskey was unaware of both pieces of evidence, the question before us is whether McCleskey's unawareness of the *factual* bases for his *Massiah* claim at the time of his first federal habeas petition is sufficient to justify his failure to present the claim. The district court found that it was sufficient, holding that McCleskey's unawareness precluded a finding of deliberate abandonment of the claim, despite the fact that McCleskey had raised it in his first state habeas petition. We disagree.

In finding that McCleskey did not deliberately abandon his *Massiah* claim, the district court stated that:

> First petitioner cannot be said to have intentionally abandoned this claim. Although petitioner did raise a *Massiah* claim in his first state petition, that claim was dropped because it was obvious that it could not succeed given the then-known facts. At the time of his first federal petition, petitioner was unaware of Evans' written statement, which, as noted above, contains strong indications of an *ab initio* relationship between Evans and the authorities. Abandoning a claim whose supporting facts only later become evident is not an abandonment that "for strategic, tactical, or any other reasons . . . can be described as the deliberate by-passing of state procedures." . . . Petitioner's *Massiah* claim is therefore not an abuse of the writ on which no evidence should have been taken. This is not a case where petitioner has reserved his proof or deliberately withheld his claim for a second petition. . . . Nor is the petitioner now raising an issue identical to one he earlier considered without merit.

McCleskey, No. C87-1517A, slip op. at 24 (citations omitted).

This holding by the district court misconstrues the meaning of deliberate abandonment. McCleskey included a *Massiah* claim in his first state petition, dropped it in his first federal petition, and now asserts it again in his second federal petition.[9] Given that McCleskey had

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[9] In an amendment to his first state petition, McCleskey alleged that:

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asserted the *Massiah* claim in his first state habeas petition, it is clear that the issue was not unknown to him at the time of his first federal petition. Further, we must assume that at the time McCleskey filed his first state habeas petition, counsel had determined that there was some factual basis for a *Massiah* claim. Indeed, such a determination is not surprising. Not only was counsel aware that Evans was in a cell next to McCleskey,[10] but counsel was also aware that some sort of relationship existed between Evans and the police, as this formed the basis of McCleskey's *Giglio* claim.[11] The petitioner and his counsel did not accidentally fail to include the *Massiah* claim in the federal petition, but made a knowing choice not to pursue the claim after having raised it previously. This constitutes prima facie evidence of deliberate abandonment. In *Darden v. Dugger*, we stated that:

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> The introduction into evidence of petitioner's statements to an informer, elicited in a situation created to induce the petitioner to make incriminating statements without assistance of counsel, violated the petitioner's right to counsel under the Sixth Amendment to the Constitution of the United States and Section 2-111 of the 1976 Constitution of the State of Georgia.

[10] Evans testified at trial as to certain statements that McCleskey had made in prison.

[11] In *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), the Supreme Court held that the state violates due process when it obtains a conviction on the basis of a witness's testimony when the witness has failed to disclose a promise of favorable treatment from the prosecution. McCleskey included a *Giglio* claim in his first state and first federal habeas petitions.

> The record shows that the issue presented in this third petition was specifically withdrawn from the district court's consideration as being not well founded. The issue was abandoned. Intentional abandonment of a claim is precisely the context that application of the concept of abuse of the writ is intended to address. *Witt*, 755 F.2d at 1397. Petitioner may be deemed to have waived his right to a hearing on a successive application for federal habeas relief when he deliberately abandons one of his grounds at the first hearing.

825 F.2d at 294.

When asked at the second federal habeas hearing why he did not pursue the *Massiah* claim in his first federal petition, counsel responded that his efforts to find evidence in support of the claim had failed. It appears, however, that these efforts were somewhat lacking. Counsel testified that he informally attempted to contact jailers at the Fulton County Jail, but that they could provide him with no information.[12] He also noted that at

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[12] At his second federal habeas hearing, the lawyer who represented McCleskey at the first federal habeas hearing testified that he "spoke with a couple of Atlanta Bureau of Police Services Officers" in order to find out how to develop factual evidence in support of a claim. Pursuant to their suggestion, counsel spoke with two or three persons who were deputies at the Fulton County Jail. He testified that "none of them had any information. Basically they had no recollection of the circumstances regarding how Evans came to be assigned to the jail cell that he was assigned to or of any conversations with the Atlanta Bureau of Police Services Detectives regarding Offie Evans' assignment to that jail cell."

Counsel apparently made no attempt to contact persons who clearly had contact with Evans and McCleskey at the

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a deposition taken for the first state habeas hearing, Russell Parker, the District Attorney prosecuting the case, claimed that he was unaware of any instance in which Evans had worked for the Atlanta Police Department prior to his overhearing conversations at the Fulton County Jail. Counsel testified that he did not carry the *Massiah* claim over into the federal habeas petition because he "looked at what we had been able to develop in support of the claim factually in the state habeas proceeding and made the judgment that we didn't have the facts to support the claim and, therefore, did not bring it into federal court."

Abandoning a claim after initial investigatory efforts prove unsuccessful cannot insulate a petitioner from abuse of the writ. *See Witt v. Wainwright*, 755 F.2d at 1397 (insufficient to allege that evidence was not available if it was within petitioner's power to elicit such evidence at time of earlier petition); *Woodard v. Hutchins*, 464 U.S. 377, 379 & n. 3, 104 S.Ct. 752, 753 & n. 3, 78 L.Ed.2d 541 (1984) (per curiam) (Powell, J., concurring, joined by four other justices) (petitioner found to have abused the writ when he is unable to explain why examination providing evidence of insanity was not conducted earlier); *Antone v. Dugger*, 465 U.S. 200, 205 & n. 3, 206, 104 S.Ct. 962, 964 & n. 3, 965, 79 L.Ed.2d 147 (1984) (per curiam) (haste with

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Fulton County Jail. He testified that he did not speak to Detective Dorsey (mentioned by Evans in his testimony at the first state habeas hearing), to Detectives Jowers or Harris (officers who had investigated the McCleskey case), or Deputy Hamilton (who testified at trial regarding his contact with Mr. Evans).

which first habeas petition prepared does not require courts to consider claims withheld from that petition if substance could have been presented in first petition).

McCleskey places great emphasis on the fact that the State allegedly withheld Evans' 21-page statement from both trial and habeas counsel. The statement was ultimately obtained in June of 1987 through a request pursuant to the Georgia Open Records Act, O.C.G.A. § 50-18-72(a). It is clear, however, that the statement itself does not demonstrate the existence of a *Massiah* violation. At most, it was simply the catalyst that caused counsel to pursue the *Massiah* claim more vigorously. The key piece of evidence supporting McCleskey's *Massiah* claim was the testimony of Worthy, who testified for the first time at the second federal habeas hearing in July of 1987. Counsel claims that he did not discover Worthy until he engaged in a "massive, indiscriminate effort to subpoena everyone whose name was mentioned in any document." McCleskey has not presented any reason why counsel would have been unable to contact Ulysses Worthy back in 1981 when the first federal habeas petition was filed. Nor has he shown that a more extensive effort at that time to track down persons with information as to what transpired in the county jail during the summer of 1978 would not have turned up Worthy. A petitioner and his counsel may not circumvent the abuse of the writ doctrine by failing to follow through with an investigation and then later asserting that the claim could not have succeeded earlier on the facts as then known. It will only be possible to avoid piecemeal litigation if counsel is

required to make a thorough investigation of the facts at the time of petitioner's first petition for habeas corpus.[13]

C. *Ends of Justice*

Having found that McCleskey abused the writ by deliberately abandoning his *Massiah* claim, we must now decide whether the "ends of justice" require consideration of his claim on the merits.[14] *Sanders v. United States*, 373 U.S. at 16-19, 83 S.Ct. at 1078-79. In *Kuhlmann v. Wilson*, the Supreme Court attempted to give greater content to the open-ended "ends of justice" inquiry. Its statement, however, that "the 'ends of justice' require federal courts to entertain such petitions only where petitioner supplements his constitutional claim with a colorable showing of factual innocence," 477 U.S. at 454, 106 S.Ct. at 2627, commanded only a plurality of the justices. *See Messer v. Kemp*, 831 F.2d 946, 958 n. 19 (11th Cir.1987) (en banc), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1586, 99 L.Ed.2d 902 (1988). Thus, the circumstances under which ends of justice would require rehearing of an otherwise abusive petition remain unparticularized.

We find it unnecessary to more narrowly define the circumstances in this case. For, the instances in which

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[13] We also note that in 1981 there apparently still existed records listing each prisoner's cell assignment and any visitation of prisoners by outsiders. These records, which would have corroborated or disproved Worthy's testimony, have since been destroyed.

[14] The district court did not reach the "ends of justice" inquiry as it found that McCleskey's claim did not constitute abuse of the writ.

ends of justice would require a rehearing of a claim do not include those in which a violation of a constitutional right would be found to constitute harmless error.[15] The members of this panel disagree as to whether the district court was correct in finding that McCleskey had established a *Massiah* violation. Pretermitting that inquiry, however, the panel is unanimous that any violation that may have occurred would constitute harmless error and that the district court erred in concluding otherwise.

D. *Harmless Error*

The remedy for a *Massiah* violation is not an automatic reversal of a conviction, but rather the exclusion of evidence tainted by the violation of petitioner's right to counsel. *United States v. Morrison*, 449 U.S. 361, 365, 101 S.Ct. 665, 668, 66 L.Ed.2d 564 (1981). The previous use of the tainted evidence will not result in a reversal of a conviction if it constituted "harmless error." Under the harmless error doctrine, the state must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). *See also, Satterwhite v. Texas*, 486 U.S. 249, 108 S.Ct. 1792, 1798, 100 L.Ed.2d 284 (1988) (harmless error analysis

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[15] *See Messer v. Kemp*, 831 F.2d at 958-59:

> Because we conclude, as a matter of law, that the record in this case fails to disclose an *Ake* violation our "ends of justice" analysis need not proceed any further. That is, we need not address any other factors relevant to the "ends of justice" in light of our conclusion that no constitutional violation occurred.

applied to sixth amendment violation tainting evidence in sentencing phase of capital trial); *Brown v. Dugger*, 831 F.2d 1547, 1554 (11th Cir.1987).

In this case, the district court held that the error complained of could not be found harmless because Evans' testimony concerning McCleskey's incriminating statements was critical to the State's case. In reaching this conclusion, the court ignored the Eleventh Circuit's previous discussion in *McCleskey*, 753 F.2d at 884-85, of the importance of the evidence introduced through Evans' testimony at trial. Though that discussion occurred in the context of McCleskey's *Giglio* claim, it clearly has bearing on the import of Evans' testimony in the context of McCleskey's *Massiah* claim. It is true, as petitioner argues, that the harmless error inquiry in the case of a *Giglio* claim differs from the inquiry in the case of a *Massiah* violation, but this difference does not save McCleskey's claim.

The crucial question in a *Giglio* claim is whether the state's failure to disclose its promise of reward to a witness affected the judgment of the jury as to the credibility of that witness. *See Giglio*, 405 U.S. at 154, 92 S.Ct. at 766. In its previous opinion, the Eleventh Circuit held that the judgment of the jury that convicted McCleskey was not affected by the lack of disclosure. Its holding was based on two separate grounds. First, it found that "Evans' credibility was exposed to substantial impeachment even without the detective's statement and the inconsistent description of his escape," as the jury had already been made aware of Evans' extensive list of past convictions. 753 F.2d at 884. Second, and more important for our purposes, the Eleventh Circuit found that, in light of all

the other evidence presented to the jury, Evans' testimony could not " 'in any reasonable likelihood have affected the judgment of the jury.' " *Id.* at 885 (quoting *Napue v. Illinois*, 360 U.S. 264, 271, 79 S.Ct. 1173, 1178, 3 L.Ed.2d 1217 (1959)). This is precisely the finding that must be made in a harmless error analysis under *Massiah* and upon reexamination, we find no reason to disturb this finding.

Evans was called by the State on rebuttal to strengthen its proof that McCleskey was the triggerman at the holdup. He testified that McCleskey had admitted to him that he had shot the policeman and that McCleskey had admitted to wearing makeup to disguise himself during the robbery. He also stated that McCleskey said he would have shot his way out even if there had been a dozen policemen.

Turning first to Evans' testimony regarding McCleskey's admission that he was the triggerman, we feel that the State has met its burden of proving, beyond a reasonable doubt, that this testimony did not contribute to the verdict. First, as noted by the en banc court, McCleskey's codefendant, Ben Wright also testified that McCleskey was the triggerman. Though Georgia law requires corroboration of an accomplice's testimony in felony cases, it is clear that corroboration can be through circumstantial as well as direct evidence. *Davis v. State*, 178 Ga.App. 760, 344 S.E.2d 730, 732 (Ga.App.1986) (quoting *Gunter v. State*, 243 Ga. 651, 655, 256 S.E.2d 341 (Ga.1979)).

The State presented a substantial amount of circumstantial evidence. McCleskey himself confessed to his

participation in the robbery. The officer was killed by the man who entered and secured the front of the store while the other three men were in the back. McCleskey was identified by two of the store personnel as the robber who came in the front door. The officer was killed by a bullet from a .38 caliber Rossi handgun. The State presented evidence that McCleskey had stolen a .38 caliber Rossi in a previous holdup. The gun that McCleskey had stolen had a white handle. The State presented testimony from an eyewitness that the robber who ran out the front door after the robbery was carrying a pearl-handled pistol. This evidence not only corroborates Ben Wright's testimony, but is of sufficient quantity to allow this court to find that any additional testimony by Evans did not contribute to the verdict.

Evans' testimony regarding McCleskey's statement that he was wearing makeup could also not have reasonably affected the jury's determination. The en banc court found that:

> Evans' testimony that McCleskey had made up his face corroborated the identification testimony of one of the eyewitnesses. Nevertheless, this evidence was not crucial to the State's case. That McCleskey was wearing makeup helps establish he was the robber who entered the furniture store through the front door. This fact had already been directly testified to by McCleskey's accomplice and two eyewitnesses as well as corroborated by McCleskey's own confession. That Evans' testimony buttresses one of the eyewitnesses' identifications is relatively unimportant.

753 F.2d at 885.

Finally, petitioner asserts that Evans' testimony as to McCleskey's statement that he would have been willing to shoot twelve policemen affected the jury's finding as to the presence of malice and increased its willingness to impose a sentence of death. Once again, we find that the en banc court's analysis of this issue demonstrates that this testimony was not crucial to the jury's finding of malice murder. The court wrote that:

> In his closing argument, however, the prosecutor presented to the jury three reasons supporting a conviction for malice murder. First, he argued that the physical evidence showed malicious intent because it indicated that McCleskey shot the police officer once in the head and a second time in the chest as he lay dying on the floor. Second, the prosecutor asserted that McCleskey had a choice, either to surrender or to kill the officer. That he chose to kill indicated malice. Third, the prosecutor contended that McCleskey's statement to Evans that he still would have shot his way out if there had been twelve police officers showed malice. This statement by McCleskey was not developed at length during Evans' testimony and was mentioned only in passing by the prosecutor in closing argument.

Id. at 885. In addition, the court finds no reasonable likelihood that the jury's imposition of the death penalty was affected by Evans' testimony. The prosecutor did not introduce Evans as a witness at the sentencing phase of trial, nor did he use Evans' testimony to portray McCleskey as a hardened criminal deserving of death, but concentrated instead on McCleskey's prior convictions.[16]

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[16] This case can easily be distinguished from *Satterwhite v. Texas*, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988), a

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Because evidence other than Evans' testimony presented in the case presents such a clear indication of McCleskey's guilt, this court finds beyond a reasonable doubt that the jury would have convicted and sentenced McCleskey as it did even without Evans' testimony. Our determination that any *Massiah* error would be harmless precludes a finding that the ends of justice would require us to entertain McCleskey's claim on the merits.

CONCLUSION

The judgment of the district court granting the petition for writ of habeas corpus is reversed and the petition is hereby denied as an abuse of the writ.

REVERSED.

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case that petitioner cites as controlling. In *Satterwhite*, a psychiatrist, who had interviewed the defendant in violation of his sixth amendment rights, testified in a separate sentencing proceeding that the defendant presented a threat to society through continuing acts of violence. In finding that the constitutional error was not harmless, the Court stressed that under Texas law, a jury may not sentence a defendant to death unless it finds that the defendant would commit acts of violence and would be a threat to society. Additionally, the Court found that the psychiatrist's testimony stood out "both because of his qualifications as a medical doctor specializing in psychiatry and because of the powerful content of his message." *Id.* at ___, 108 S.Ct. at 1799. In the instant case, the jury was not instructed as to future dangerousness, and the Eleventh Circuit found, in its previous discussion of the *Giglio* violation, that Evans' testimony had already been greatly impeached by his own criminal background. 753 F.2d at 884.

Supreme Court of the United States

No. 89-7024

Warren McCleskey,

Petitioner

v.

Walter D. Zant, Superintendent, Georgia Diagnostic & Classification Center

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Eleventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. In addition to the questions presented, the parties are requested to brief and argue the following question:

> "Must the State demonstrate that a claim was deliberately abandoned in an earlier petition for a writ of habeas corpus in order to establish that inclusion of that claim in a subsequent habeas petition constitutes abuse of the writ?"

June 4, 1990